

No. 15652

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United States  
Court of Appeals  
for the Ninth Circuit

*See also  
Vols. 2931 and  
3033  
(No. 14705)*

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UNITED MERCURY MINES COMPANY,  
a corporation, Appellant,

vs.

BRADLEY MINING COMPANY, a corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Southern Division

FILED  
SEP 25 1957



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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED MERCURY MINES COMPANY,  
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BRADLEY MINING COMPANY, a corporation,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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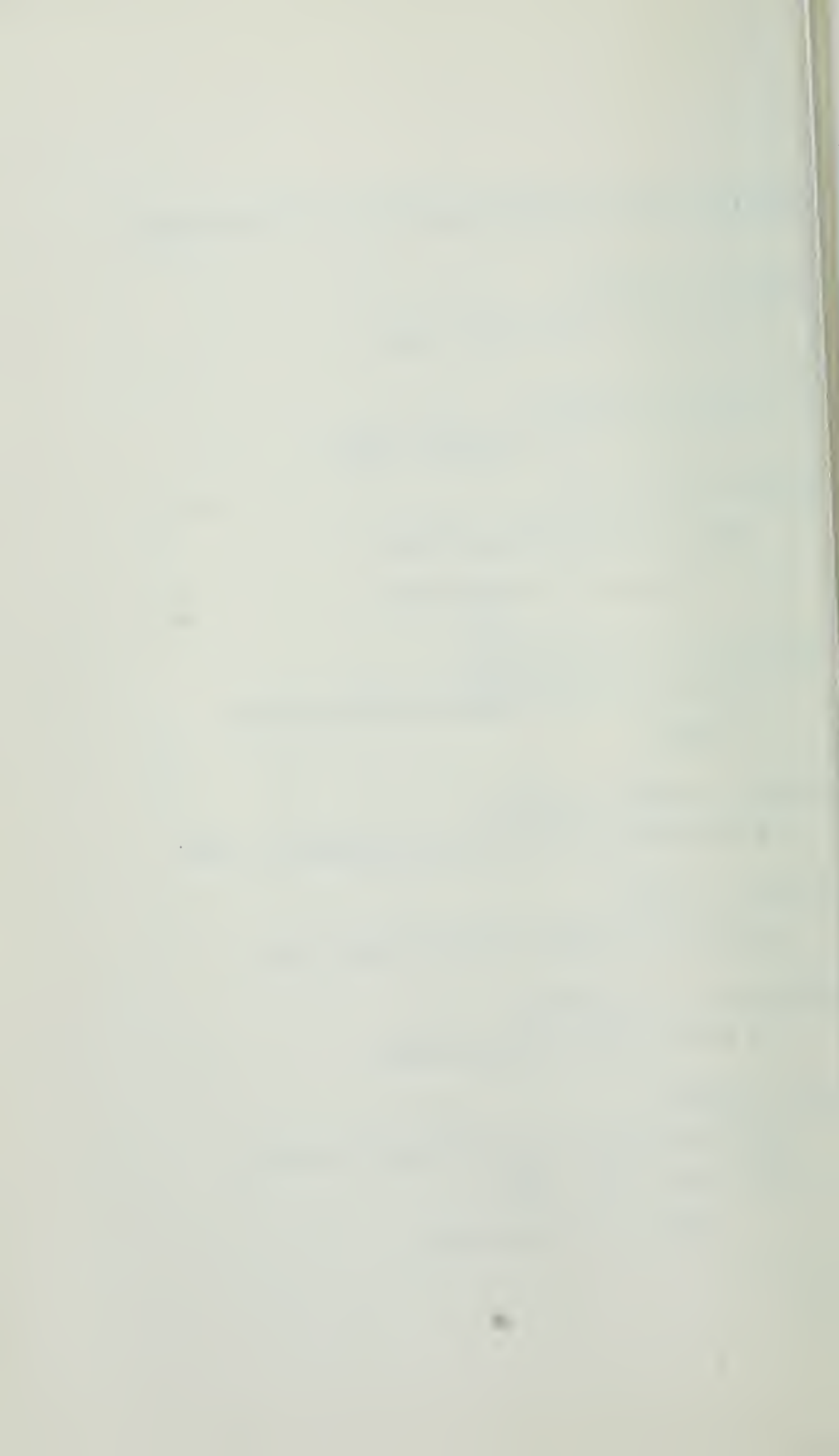
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In the District Court of the United States for the  
District of Idaho, Southern Division

No. 2854

UNITED MERCURY MINES COMPANY, a cor-  
poration, Plaintiff,

vs.

BRADLEY MINING CO., a corporation,  
Defendant.

### COMPLAINT

Comes now the plaintiff and complains of the de-  
fendant and alleges:

#### I.

That at all times mentioned herein the plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of Idaho and is a citizen and resident of said State; that at all times herein mentioned the defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of California and is a citizen and resident of said State, but qualified to do business and doing business in the State of Idaho in full conformity with the laws of said latter State relating to foreign corporations doing business therein.

#### II.

That on or about the 31st day of December, 1941, the plaintiff as first party and the defendant as sec-

ond party entered into, made and executed a written conveyance, Royalty Agreement and Option, a copy of which is hereunto annexed, marked Exhibit 1, and by this reference made a part hereof. That among other things by said instrument the plaintiff, in consideration of certain royalties to be paid by defendant, conveyed to defendant numerous mining claims and other property therein described, and the defendant covenanted, promised and agreed to and with the plaintiff:

“To pay to United (the plaintiff, herein) its successors and assigns, a royalty of five percent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims; the payment of said five per cent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores and values shall be extracted, mined or taken from the above described property, at the times and in the manner hereinafter provided; said royalty to be paid to United by depositing the same with the First Security Bank of Idaho, at Boise, Idaho, or at such other place as may be designated in writing by United, to the credit and order of United on or be-



fore the 20th day of the calendar month next succeeding the receipt by Bradley of said net returns as defined herein, the same to be so paid each and every month when any net smelter, mint, or other returns are received by Bradley, copies of all sales returns to be furnished United by Bradley."

That said instrument further provides that:

"By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

"By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals and values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

"By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.

"It is agreed that in addition to the deductions of railroad freight from Cascade, Idaho, to the smelter, market, or mint, that Bradley shall also be allowed to deduct from the net smelter, market, or mint returns Two Dollars and Fifty Cents (\$2.50) per ton for each ton of concentrates, ores, metals, or values hauled or shipped from the above described property to Cascade, Idaho, the said sum to be deducted from the net smelter, market or mint

returns before net royalty herein provided for is computed.

“It is also agreed that in the event that concentrates or bullion are hauled or shipped by truck to a smelter, market, or mint beyond Cascade, Idaho, there shall be deducted from the net smelter, market, or mint returns the amount for trucking that it would have cost to ship the same by railroad from Cascade, Idaho, to the smelter, market, or mint to which the same are trucked.

“Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.

“It is agreed that reference in this instrument to “Cascade, Idaho”, shall be deemed to include Cascade, McCall, or any nearby place from which shipment is made by rail.”

And that:

“The above covenants on the part of Bradley to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to Bradley and shall be binding upon Bradley, its successors and assigns, forever.”

### III.

That said instrument further provides:

“It is agreed that Bradley shall furnish United all necessary information that United may require

to assure it that it is receiving the royalty to which it is entitled hereunder, and that United shall have the right to inspect, examine and make copies of the books and records of Bradley and supporting data at least every six (6) months so as to enable United to satisfy itself that it is receiving its proper royalties." and that:

"In the event Bradley, its successors and assigns, fails or refuses to pay any royalties herein reserved when the same shall become due that the said United shall have a mortgage lien in, to, and upon all of the above and foregoing described properties to secure the payment of said sums and Bradley does hereby mortgage the above and foregoing described properties, and any interest it may hereafter acquire in the Midnight Group hereinafter described, and the whole thereof, to secure the payment of said royalty."

#### IV.

That at the time said agreement was entered into and thereafter until the commencement of smelter operations upon the mining properties, as hereinafter alleged, defendant Bradley Mining Co. mined, extracted and took from said mining properties minerals, ores, metals and values, consisting among others of gold, silver, antimony, tungsten, sulphur, arsenic and copper.

That said Bradley Mining Co. trucked the above mentioned minerals, ores, metals and values from the mining properties to Cascade, Idaho, and there placed the same on railroad for shipment and

shipped the same to smelters or reducing plants in the ownership of which neither plaintiff nor defendant had any interest, and which were located in various parts of the United States.

That said defendant would, monthly, render to plaintiff a statement and copies of smelter settlement statements purporting to show all amounts received by defendant and the defendant would pay to plaintiff the royalty percentage of five per cent (5%) of such amount received by said Bradley Mining Co.

That attached hereto marked Exhibit 2 and made a part hereof as if set forth in full herein is a true, full and correct copy of the statement rendered by the defendant to the plaintiff for the month of December, 1948, being the form of report made by the defendant to the plaintiff prior to the construction of the Yellow Pine smelter.

#### V.

That in the year 1949 the defendant constructed and began operation of a smelter upon the said mining premises. That said smelter is commonly and hereinafter called the Yellow Pine smelter and the ownership and operation of said smelter by defendant has continued from July, 1949, until the present time and is expected to continue hereafter. That the greater part of the minerals, ores, metals and values extracted from the mining properties are, and since July, 1949, have been, processed through said Yellow Pine smelter. After such processing the saleable products are sold by the said

defendant to various purchasers, the names and addresses of whom are unknown to plaintiff but known to, though undisclosed by, defendant, for sums the amounts of which are unknown to plaintiff but known to, though undisclosed by, defendant at marketing and shipping costs from Cascade, Idaho, known to, but undisclosed by, defendant but unknown to plaintiff.

That notwithstanding the provision in said contract that "the amount paid by any purchaser \* \* \* less marketing and shipping costs from Cascade, Idaho", is the amount upon which the royalty due plaintiff is to be computed and paid by defendant, with respect to sales made by defendant, defendant has, notwithstanding demands of plaintiff therefore, and the hereinbefore quoted provisions of said contract requiring the furnishing of information, refused to furnish the information above alleged to be unknown to plaintiff and to pay royalty based on the amounts paid by such purchasers less marketing and shipping costs.

## VI.

That defendant asserts that it interprets said contract so as to permit, with respect to minerals, ores, metals and values passing into the said Yellow Pine smelter, the use of, and it does use, a formula devised by it whereby it purports to allow credits to itself for concentrates passing into said smelter, and to charge against itself deductions, so-called adjusted prices and penalties, for and in respect to the content of said concentrates and to designate



the difference as net smelter returns received by itself from its own said Yellow Pine smelter, and further that said contract permits it to compute and pay to plaintiff as the royalty provided for by said contract five per cent (5%) of said formula determined net smelter returns. That since the commencement of its operation of such smelter it has, and still does, compute and pay royalties in such manner and amounts. That for purposes of illustration of the foregoing there are hereunto annexed, marked Exhibit 3, the report and settlement sheets for the month of March, 1951, upon which defendant has computed and paid royalties, and is typical of the information furnished plaintiff with respect to mined material passing through said smelter and of the method employed by defendant in computing and paying royalties from the beginning of the operation of said smelter to the present.

#### VII.

That the difference between the amount of royalty computed and paid by the defendant as alleged in Paragraph VI hereof and the amount due plaintiff under the provisions of said contract as alleged in Paragraph V hereof exceeds the sum of \$10,000.00.

#### VIII.

That as to minerals, ores, metals and values which do not pass through Yellow Pine smelter the practice set forth in Paragraph IV has been and is being followed with respect to reporting and to payment of royalties.

IX.

That an actual controversy exists between the plaintiff and defendant with respect to their rights and other legal relations under said agreement as follows:

1. The provisions of said agreement applicable to the computation and payment of royalties in respect to minerals, ores, metals and values smelted at said Yellow Pine smelter.

2. The nature and extent of the obligation of defendant to furnish to plaintiff information that plaintiff may require to assure it that it is receiving the royalty to which it is entitled.

X.

That this action is between citizens of different States and the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs, and jurisdiction of the Court is conferred by Section 1332, United States Code (Act of June 25, 1948, C. 646, 62 Stat. 930).

Wherefore, Plaintiff prays decree of this Court as follows:

1. That the Court interpret the provisions of said contract exhibit 1, and enter its decree herein determining and decreeing that the proper and legal method for determining the amount of royalty due plaintiff under said contract for minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter of the defendant is by the use of "net revenue" as defined in said contract.

2. That the Court determine and declare that it is the duty of the defendant under said contract to furnish plaintiff the amount paid by purchasers from the sale of minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter and the marketing and shipping costs from Cascade, Idaho.

3. That the Court require an accounting by the defendant to the plaintiff and, upon such accounting being had, that plaintiff have judgment against the defendant for any amount found due, owing and unpaid and that such amount be declared as provided in said contract, a mortgage lien in, to and upon the properties described therein.

4. That plaintiff have such other and further relief as the Court may deem equitable in the premises, and its costs of suit.

SAM S. GRIFFIN,  
/s/ SAM S. GRIFFIN,  
MAURICE H. GREENE,  
/s/ MAURICE H. GREENE,  
Attorneys for Plaintiff.

Duly Verified.

#### EXHIBIT 1

##### Conveyance, Royalty Agreement and Option

This agreement, made and entered into this 31st day of December, 1941, by and between the United Mercury Mines Company, a corporation, organized and existing under and by virtue of the laws of the State of Idaho, as Party of the First Part, hereinafter called "United", and the Bradley Mining Co.,



## Exhibit 1—Continued)

a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do business in the State of Idaho, as Party of the Second Part, hereinafter called "Bradley".

Witnesseth:

That the said United for and in consideration of the royalty hereinafter agreed to be paid by Bradley, its successors and assigns, to United, its successors and assigns, and in consideration of the mutual covenants and agreements herein contained, and subject to the royalty hereinafter reserved and retained, and the mortgage herein created to secure the payment of said royalty, has granted, bargained, sold, and assigned, and does by these presents grant, bargain, sell and assign, unto Bradley, its successors and assigns, all of the following described lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, consisting of two groups of lode mining claims, the first of said groups being commonly known as the Meadow Creek Group, and the second of said groups being commonly known as the Hennessy Group, comprising lode and placer claims and comprising the following mining claims, the patents to some of which are of record in the office of the County Recorder of Valley County, State of Idaho, and the Notices of Location of the remainder are of record in the office of the County Recorder of Valley County, State of Idaho, at the Book and Page number herein stated, to-wit:

Exhibit 1—Continued)  
Meadow Creek Group

\* \* \* \* \*

Also the following described mining claims, grounds and lands situate in the Yellow Pine Mining District in Valley County, State of Idaho, the United States Patent for which is recorded in the office of the County Recorder of Valley County, State of Idaho, in Book 3 of Patents at page 172 thereof, and which records are hereby referred to for a more particular description of said claims, to-wit:

\* \* \* \* \*

Hennessy Group

Together with an easement for a Tailing pond or ponds, and a right of way for a ditch conveying the waters of Sugar Creek through a by-pass, and the right to enter upon the hereinafter described lands for the purpose of diverting the waters of Sugar Creek through a by-pass and maintaining and operating a Tailing pond upon the following described lands situate in Valley County, State of Idaho, to-wit: \* \* \* \* \*

Together, with all dips, spurs and angles of all lodes located therein;

Together with the tenements, hereditaments and appurtenances and rights and privileges thereunto belonging or in anywise appertaining;

Together with the personal property situate upon said mining claims;

Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings,

## Exhibit 1—Continued)

buildings, structures, water rights, tail races, tailing sites, tailing dams or easements, together with Power Permits Nos. 863 and 1052, and application for Power Permit No. 1857, to have and to hold, subject to the royalty herein reserved and retained by United, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said Bradley, its successors and assigns, forever.

Bradley agrees that it is familiar with the above described mining claims and the conditions of the title it is receiving from United under this instrument, and hereby accepts the same in its present condition, and agrees never to assert any claim against United for or on account of any defects, objections, claims, adverse or otherwise, to the title that United is conveying hereunder. United warrants, however, that it has placed no mortgages upon any of said property that have not been paid, satisfied and discharged, and that it has not sold or assigned said properties, or any part thereof, to any third person, firm or corporation.

For and in consideration of the premises and the conveyance and assignment of the above described properties, Bradley, for itself, its successors and assigns, does hereby covenant, promise and agree to pay to United, its successors and assigns, a royalty of five per cent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted

## Exhibit 1—Continued)

or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims; the payment of said five percent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property, at the times and in the manner hereinafter provided; said royalty to be paid to United by depositing the same with the First Security Bank of Idaho, at Boise, Idaho, or at such other place as may be designated in writing by United, to the credit and order of United on or before the 20th day of the calendar month next succeeding the receipt by Bradley of said net returns as defined herein, the same to be so paid each and every month when any net smelter, mint, or other returns are received by Bradley, copies of all sales returns to be furnished United by Bradley.

It is agreed that Bradley shall furnish United all necessary information that United may require to assure it that it is receiving the royalty to which it is entitled hereunder, and that United shall have the right to inspect, examine and make copies of the books and records of Bradley and supporting data at least every six (6) months so as to enable United

## Exhibit 1—Continued)

to satisfy itself that it is receiving its proper royalties.

By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.

It is agreed that in addition to the deductions of railroad freight from Cascade, Idaho, to the smelter, market, or mint, that Bradley shall also be allowed to deduct from the net smelter, market, or mint returns Two Dollars and Fifty Cents (\$2.50) per ton for each ton of concentrates, ores, metals, or values hauled or shipped from the above-described property to Cascade, Idaho, the said sum to be deducted from the net smelter, market or mint returns before net royalty herein provided for is computed.

It is also agreed that in the event that concentrates or bullion are hauled or shipped by truck to



## Exhibit 1—Continued)

a smelter, market, or mint beyond Cascade, Idaho, there shall be deducted from the net smelter, market, or mint returns the amount for trucking that it would have cost to ship the same by railroad from Cascade, Idaho, to the smelter, market, or mint to which the same are trucked.

Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.

It is agreed that reference in this instrument to "Cascade, Idaho," shall be deemed to include Cascade, McCall, or any nearby place from which shipment is made by rail.

The above covenants on the part of Bradley to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to Bradley and shall be binding upon Bradley, its successors and assigns, forever.

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley, its successors, and assigns, and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

## Exhibit 1—Continued)

Anything in this agreement contained to the contrary notwithstanding, it is the intention of the Parties to this agreement that the full ownership, possession and control of all the properties above described, and the full ownership, possession and control of all the properties hereinbefore in this instrument conveyed, and all of the personal property acquired and/or used on or in connection with the operation and development of the above described properties, shall be vested in Bradley, and the United shall have no interest in fee in or to said properties, or in and to any of the personal property acquired and/or used in connection with the operation and development of said properties; Except that in the event Bradley, its successors and assigns, fails or refuses to pay any royalties herein reserved when the same shall become due that the said United shall have a mortgage lien in, to, and upon all of the above and foregoing described properties to secure the payment of said sums and Bradley does hereby mortgage the above and foregoing described properties, and any interest it may hereafter acquire in the Midnight Group hereinafter described, and the whole thereof, to secure the payment of said royalty.

It is agreed that three and one-third percent of any sums to be paid by Bradley under the terms of this instrument shall be paid to Oscar W. Worthwine, his heirs or assigns.

For and in consideration of the premises, and the covenant of Bradley to pay the royalty herein-

## Exhibit 1—Continued)

before provided for, United hereby gives and grants unto the said Bradley an option to acquire, within one year from December 31, 1941, all the right, title and interest of United in and to that certain group of lode mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, commonly known as the Midnight Group, the notices of location of which are of record in the office of the County Recorder of Valley County, State of Idaho, at the Book and Page number herein stated, to-wit:

## Midnight Group

\* \* \* \* \*

Together with all dips, spurs and angles of all lodes located therein;

Together with the tenements, hereditaments and appurtenances and rights and privileges thereunto belonging or in anywise appertaining;

Together with all personal property situate upon said mining claims;

Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings, buildings, structures, water rights, tail races, tailing sites, tailing dams or easements, To Have and To Hold, subject to the royalty herein reserved and retained by United, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said Bradley, its successors and assigns, forever.

For and in consideration of the premises and the granting of said option upon the Midnight group



## Exhibit 1—Continued)

of lode mining claims, Bradley agrees to do the following things:

## I.

To do the annual assessment work for the year ending at noon, July 1, 1942, for or upon the above described Midnight group of mining claims, and to do the assessment work for or upon the above described Midnight group of mining claims for the year ending at noon, July 1, 1943, it being understood and agreed that if Bradley does work that can be applied under the laws of the United States as assessment work upon the claims described in the Midnight Group that said work may be performed either upon or for the benefit of said Midnight Group upon other property owned by said Bradley; failure by Bradley to do said assessment work shall not work a forfeiture of the grant and conveyance hereinbefore made.

## II.

Bradley further agrees that prior to January 1, 1943, it will examine and test the grounds and lands contained in said Midnight group of mining claims and satisfy itself as to whether it desires to proceed further under the option herein given and granted, the amount and extent of said testing to be in the sole discretion of Bradley.

## III.

If said Bradley elects to acquire said Midnight group of mining claims, it shall, on or before the first day of January, 1943, serve written notice to

## Exhibit 1—Continued)

that effect upon United by registering a copy of said notice to the United at its office in the Sonna Building, Boise, Idaho, together with a copy thereof to Oscar W. Worthwine, 401 Idaho Building, Boise, Idaho, and a copy of said notice to the First Security Bank of Idaho, at Boise, Idaho; and in addition to serving said notice shall deliver to the said Bank for United the Certificate hereinafter in Paragraph Six (VI) set forth, the same to be duly signed and acknowledged by Bradley.

In the event that Bradley elects not to proceed further under this option, then the said Bradley shall, on or before January 1, 1943, give written notice of its election not to proceed hereunder, the same to be served in the same manner as above provided of its notice of election to proceed hereunder.

## IV.

United agrees that upon the execution of this instrument it will deposit a copy of this agreement, together with a mining deed conveying such interest as United may have in the above described Midnight group of mining claims (United not in any way warranting its title) in escrow with the First Security Bank of Idaho, at Boise, Idaho, the same to be delivered by said First Security Bank of Idaho to Bradley upon the receipt by said Bank of the Certificate herein described and upon receipt of the Notice of the election of Bradley to exercise its option to acquire the said Midnight group of lode mining claims under the terms and conditions

## Exhibit 1—Continued)

as herein specified, and if Bradley elects not to take said Midnight Group then said deed shall be returned by said Bank to United.

## V.

It is agreed that in the event Bradley elects, under this option, to acquire the said Midnight group of lode mining claims and to receive delivery of said deed in escrow with the First Security Bank of Idaho, Boise, Idaho, that thereafter, and beginning as of January 1, 1943, the royalty hereinbefore in this instrument provided for to be paid by Bradley to United shall be increased by one-half ( $\frac{1}{2}$ ) per cent; that is to say, instead of Bradley paying to the said United a five per cent (5%) royalty upon all ores, concentrates and values taken or extracted, marketed, sold or disposed of, from all the properties referred to in this instrument that it shall pay five and one-half ( $5\frac{1}{2}\%$ ) net royalty, as defined herein, upon any and all ores, metals or values extracted, marketed, sold, or disposed of from said Meadow Creek, Hennessy and Midnight Groups of lode mining claims all of which are more particularly described in this instrument, the said five and one-half per cent ( $5\frac{1}{2}\%$ ) royalty, as hereinbefore in this instrument defined, to be paid in the manner and at the times as hereinbefore set forth.

\* \* \* \* \*

## VII.

It is agreed that in the event Bradley elects not

## Exhibit 1—Continued)

to acquire said Midnight group of mining claims on or before January 1, 1943, that thereafter, the said Bradley shall have no right, title, interest, or claim in and to the aforesaid Midnight group of mining claims; Provided, However, that the failure of said Bradley to exercise its option as herein given to acquire said Midnight group of mining claims shall in no way affect the conveyance herein made by United to Bradley of said Meadow Creek and Hennessy Groups of mining claims as hereinbefore described, nor shall it in anyway affect the five percent (5%) royalty herein agreed by Bradley *to paid* to said United; and failure to give a written notice of its election not to proceed under this option shall not be considered as an election to proceed under this option.

## VIII.

Each party hereto agrees to pay for one-half ( $\frac{1}{2}$ ) the cost of all internal revenue stamps that may be required under this instrument.

## IX.

It is agreed that this conveyance and agreement to pay royalties and option agreement settles and adjusts all claims of every kind and character which United has against Bradley, the F. W. Bradley Estate, the Yellow Pine Company, and the Bradley Mining Co., on account of any non-performance by F. W. Bradley, the Yellow Pine Company and/or the Bradley Mining Co.; Except that

## Exhibit 1—Continued)

Bradley shall account to United for the royalties that shall be due to United for concentrates shipped by Bradley from Cascade, Idaho, on or before December 31, 1941, and that after Midnight, December 31, 1941, the effective date of this instrument, all other contracts between the Parties hereto shall be held and considered merged in this instrument, and particularly that certain agreement between the Parties hereto entered into upon the 16th day of May, 1939, and acknowledged by the Bradley Mining Co. upon the said 16th day of May, 1939, and by United Mercury Mines Company upon the 24th day of May, 1939, shall be and is hereby merged herein; Except that said last named agreement shall govern the amount of royalties to be paid United for concentrates shipped from Cascade, Idaho, by Bradley on or before December 31, 1941.

## X.

It is hereby agreed that the Crocker First National Bank of San Francisco, California, shall return and deliver to the United all deeds heretofore executed by United which it now has in its possession and which are in escrow with said Crocker First National Bank, and that the said Crocker First National Bank is hereby authorized and directed to return all of the deeds to United.

## XI.

It is expressly agreed and covenanted that this agreement, and all its terms and conditions, shall



Exhibit 1—Continued)

be forever binding upon the United, its successors and assigns, and upon Bradley, its successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

UNITED MERCURY MINES  
COMPANY, a corporation,  
By J. J. OBERBILLIG,  
Its President

Attest: D. D. Oberbillig, Its Ass't Secretary.

BRADLEY MINING CO.,  
a corporation,  
By JOHN D. BRADLEY,  
Its Vice-President

Attest: E. A. Griffen, Its Secretary (Seal).

[Endorsed]: Filed July 12, 1951.

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[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and answering plaintiff's complaint on file herein admits, denies and alleges as follows, to-wit:

I.

Defendant denies each and every allegation contained in plaintiff's complaint, except as herein specifically admitted.

## II.

Answering Paragraph I of plaintiff's complaint, the defendant admits the allegations contained therein.

## III.

Answering Paragraph II of plaintiff's complaint, the defendant admits that on or about December 31, 1941 the plaintiff as first party and the defendant as second party entered into and executed a written conveyance, royalty agreement, and option, a copy of which is annexed to plaintiff's complaint marked Exhibit 1; admits, that, among other things, by said instrument the plaintiff, in consideration of said royalties to be paid by the defendant, conveyed to the defendant numerous mining claims and other property therein described, and that said contract contains among other things, the language quoted therefrom in Paragraph II of said complaint.

## IV.

Answering Paragraph III of plaintiff's complaint, the defendant admits that said contract contains, among other things, the language quoted therefrom in Paragraph III of said complaint.

## V.

Answering Paragraph IV of said complaint this defendant admits that pursuant to the terms of said agreement this defendant mined, extracted and took from the mining properties minerals, ores, metals and values consisting, among other things, of gold, silver, antimony and tungsten; that prior to the

commencement of the operations of what is commonly called "The Yellow Pine Smelter" the marketable minerals, ores, metals and values were trucked to Cascade, Idaho, and there placed on railroad cars for shipment to smelters or reduction plants located in various parts of the United States and not owned by either plaintiff or defendant; admits that this defendant would monthly render to plaintiff a statement and copies of smelter settlement sheets showing the amounts received by defendant, and admits and alleges that as provided by said agreement defendant paid plaintiff 5% of the amounts received on the sale of such minerals, ores, metals and values whether sold to such independently owned smelters or other reducing plants. Defendant admits that Exhibit 2, attached to plaintiff's complaint, is a true, full and correct copy of the statement so rendered by the defendant to the plaintiff for the month of December, 1948.

## VI.

Answering Paragraph V of plaintiff's complaint this defendant admits that in the year 1949 it completed the construction on the mining premises of what is commonly called "The Yellow Pine Smelter," which smelter is the sole property of this defendant; admits that at all times since July, 1949, it has operated and is now operating said smelter and that it hopes to continue such operations hereafter. In this connection defendant alleges that a portion of the concentrates produced from the ores mined from the mining property are now treated in



the Yellow Pine Smelter, but alleges that some concentrates are sold to other smelters; admits that after the smelting process has been completed, certain of the products are sold by this defendant to purchasers, but denies that it has withheld from plaintiff any information relating to the sale of the products so sold and alleges that defendant has made available to plaintiff for inspection tabulations showing all information as to persons to whom such products were sold and the proceeds thereof. Further answering said paragraph this defendant denies that it has refused to pay royalties as required by said agreement and defendant alleges that it has at all times paid all royalties due in accordance with the terms of the agreements of the parties; admits that as to concentrates treated in the Yellow Pine Smelter, it has not computed and paid royalties as demanded by plaintiff and based upon sums received from metal sales, but in this connection alleges there is nothing in the agreement which requires defendant to compute and pay royalties on any such basis.

## VII.

Answering Paragraph VI, this defendant denies that it interprets said contract so as to permit it to pay the plaintiff royalties upon a formula devised by it, and alleges that it has at all times since the construction of said Yellow Pine Smelter paid the plaintiff royalties upon all minerals, ores, values and metals passing into said Yellow Pine Smelter upon the basis of net smelter returns as such term

is defined in said agreement. This defendant admits that Exhibit 3 is typical of the information furnished plaintiff with respect to such mined material.

#### VIII.

Defendant denies Paragraph VII of plaintiff's complaint.

#### IX.

This defendant admits the allegations of Paragraphs VIII, IX, and X of plaintiff's complaint.

#### Affirmative Defenses

As affirmative defenses to plaintiff's complaint this defendant alleges:

##### First Defense

That plaintiff's complaint fails to state a claim against defendant upon which relief can be granted.

##### Second Defense

1. That following the execution of the agreement of December 31, 1941, referred to in plaintiff's complaint, the defendant, as the owner of the mines and mining property described in said agreement, mined therefrom ores, metals and values, all of which were concentrated on the property, among such ores being ore containing gold, silver and antimony; that the marketable concentrates so obtained were hauled by truck to the rail head at Cascade, Idaho and were then shipped to various custom smelters; that the antimony concentrates were largely shipped to custom smelters located at El Segundo, California, Laredo, Texas and Kellogg,

Idaho, and the gold concentrates shipped to custom smelters located at Midvale, Utah, Tacoma, Washington and elsewhere; that all said smelters were owned by strangers to this proceeding. Defendant alleges that on all concentrates so sold, defendant regularly and in due course paid to the plaintiff five per cent of the net smelter returns, that is to say five per cent of the amount paid defendant for the concentrates so sold after allowance for transportation charges.

2. That in the course of the operation of the mine and the marketing of concentrates it became apparent that to insure continuity of operation of the mine and maximum use of its mineral resources, local reduction of concentrates would be required, both because of the limited and unreliable market for the antimony concentrates produced and because of rapidly increasing costs. As a consequence, the defendant made a study of the advisability of erecting a smelter upon or in the vicinity of the mining property; that after extensive metallurgical studies and the investigation of ore reserves and marketing conditions this defendant determined to erect such smelter; that in 1948 the defendant began the construction of a smelter upon the mining property which it called the "Yellow Pine Smelter" and in July of 1949 began the processing of concentrates therein; that in the operation of the Yellow Pine Smelter defendant has treated all concentrates the principal value of which was antimony, and has treated a substantial portion of the concentrates the principal value of which was gold, and

has continued to sell the remainder of the gold concentrates to outside smelters. Defendant alleges the amount of royalties payable to the plaintiff by the defendant as required by said agreement of December 31, 1941, has been computed as to concentrates treated in the Yellow Pine Smelter upon the basis of net smelter returns as defined in said agreement, which basis is the equivalent of the value of such concentrates on the mining property; that as to concentrates shipped to outside smelters the amount of royalties payable to the plaintiff by the defendant as required by said agreement has been computed upon the basis of the amount paid therefor by the purchaser less transportation charges. This defendant alleges that as a result of the construction and operation of the Yellow Pine Smelter large tonnages of low grade ores have become marketable, which ores, but for the construction of said smelter, would have had little or no value and other ores have become more valuable, and as a consequence plaintiff has been paid and will continue in the future to receive royalty payments far in excess of the royalties that would have been payable had the Yellow Pine Smelter not been constructed.

3. Defendant alleges that the Yellow Pine Smelter was constructed at a cost exceeding Two Million Dollars, all of which cost was borne by the defendant; that since the smelter's completion, the cost of its maintenance and operation has likewise been borne exclusively by the defendant; that nothing contained in said agreement of December 31, 1941, or in any other agreement, obligated the de-

fendant to construct and operate such smelter; that the concentrates which have been and will continue to be smelted in the Yellow Pine Smelter, have a value on the mining property before smelting which value can be determined by price quotations not controlled or influenced by defendant, and that as a consequence the royalty payable to plaintiff can be definitely calculated in money. That plaintiff seeks to so construe the agreement of December 31, 1941 as to require defendant to pay royalty at one percentage of the value of such concentrates if sold to an independently owned smelter and to pay royalty at a higher percentage of the value thereof if the concentrates are processed in the Yellow Pine Smelter; that if so construed said agreement would be unjust and would result in the unlawful taking of the property of this defendant for the benefit of plaintiff and the unjust enrichment of the plaintiff at the expense of this defendant, all in disregard of the clear intent of said agreement.

4. That each month following the execution of the agreement of December 31, 1941, and as required thereby, the defendant has rendered to the plaintiff a full, true and correct statement showing the royalties accrued and payable; that for a long period of time after the execution of the agreement of December 31, 1941, and for a long period of time after the construction and commencement of operations of the Yellow Pine Smelter the plaintiff construed said agreement to entitle it to receive a royalty of five per cent upon net smelter returns irrespective of the ownership or location of the



smelter receiving the concentrates, thus construing and interpreting the language of the agreement in the same manner as the same is now and at all times has been, construed and interpreted by this defendant, and during said period plaintiff accepted without reservation royalty payments so computed; that in an agreement made by the parties dated July 20, 1950, the plaintiff recognized and approved the methods employed by the defendant in computing royalties as being in all respects in strict conformity with the terms and conditions of said agreement of December 31, 1941.

5. That by its complaint in this action, the plaintiff seeks to have the Court so construe said agreement as to disregard the defendant's heavy investment in the Yellow Pine Smelter; to ignore the substantial financial burden and risk assumed by the defendant in constructing and operating said smelter, and particularly to ignore the cost to defendant of reducing concentrates in the Yellow Pine Smelter; to require defendant to pay royalties on such concentrates without deducting normal smelting charges. That such contentions on the part of plaintiff are contrary to the provisions of the agreement; contrary to the interpretation placed thereon by the parties thereto, and would be inequitable and unconscionable.

6. That as the parties well know it was and is the usual custom and practice in the mining and smelting industry to deduct normal smelting charges in computing net smelter returns upon which royalties should be paid; that in accordance with such



custom and practice the parties made the agreement of December 31, 1941; that said agreement (Complaint Exhibit 1—page 8) expressly provides:

“The smelter will deduct its normal smelting charges.”

That by its complaint plaintiff seeks to have the court ignore such express provision of the agreement.

Wherefore, defendant prays that this Court enter a decree as follows:

1. That the plaintiff take nothing by its complaint, and that the defendant have judgment for its costs.

2. That the Court by its decree adjudge and determine that the defendant has computed royalties due the plaintiff in accordance with the terms of the agreement of December 31, 1941, and that defendant will discharge its obligations to plaintiff in the future by computing and paying royalties in accordance with such past practices.

3. That the defendant have such other and further relief as to the Court may seem meet and equitable in the premises.

/s/ RALPH R. BRESHEARS,

/s/ JOHN PARKS DAVIS,

/s/ RAY, QUINNEY & NEBEKER,

/s/ CHENEY, MARR, WILKINS &

CANNON,

Attorneys for Defendant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 14, 1951.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial upon the 19th day of March, 1957, before the above entitled Court, sitting without a jury, at Boise, Idaho. The plaintiff appeared by and through its attorneys of record, E. H. Casterlin, Paul S. Boyd, and Dale Clemons; and the defendant appeared by and through its attorneys of record, John Parks Davis, Paul H. Ray, Robert E. Brown, G. A. Marr, and Ralph R. Breshears.

Whereupon documentary evidence was introduced and admitted, and one witness on the part and behalf of the defendant was sworn and examined and the evidence being closed said cause was duly submitted to the Court for its consideration and decision and having duly considered the evidence and the oral arguments of the parties to said action, the Court, being now fully advised both in the law and in the premises, hereby makes the following Findings of Facts and Conclusions of Law, constituting its decision in writing herein, and hereby finds the facts to be as follows:

### Findings of Fact

#### I.

That the plaintiff is a corporation organized un-

der the laws of the State of Idaho, doing business therein, and is a citizen of that State, and that the defendant is a corporation organized under the laws of the State of California, licensed to do business in Idaho, and is a citizen of the State of California.

That the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00.

## II.

That the plaintiff was, on and before December 31, 1941, the owner of two groups of lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, commonly known as the Meadow Creek Group and the Hennessy Group, more particularly described in Defendant's Exhibit 7, Plaintiff's Exhibit 23.

## III.

That on December 31, 1941, the plaintiff and defendant entered into a written "Conveyance, Royalty Agreement and Option", whereby the plaintiff bargained, sold and assigned the Meadow Creek Group and the Hennessy Group of lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, as more particularly described in Defendant's Exhibit 7, Plaintiff's Exhibit 23, to the defendant, subject to the agreement on the part of the defendant to pay the plaintiff a royalty, as in said "Conveyance, Royalty Agreement and Option" provided.

## IV.

That upon the execution of said "Conveyance, Royalty Agreement and Option" the defendant became and now is the owner of the Meadow Creek and Hennessy Groups of placer and lode mining claims, described in said agreement, subject to the terms and conditions of said agreement, together with all minerals, ores, metals and values contained therein.

## V.

That for and in consideration of the conveyance and assignment by the plaintiff to the defendant of the Meadow Creek and Hennessy Groups of placer and lode mining claims, the defendant agreed to pay to the plaintiff a royalty of five per cent on all net smelter returns, net revenue, and net mint returns, as defined in the "Conveyance, Royalty Agreement and Option", upon and for all minerals, ores, metals or values of any and every kind and character, mined, extracted or taken from said mining claims, said agreement providing with respect thereto as follows:

"For and in consideration of the premises and the conveyance and assignment of the above described properties, Bradley, for itself, its successors and assigns, does hereby covenant, promise and agree to pay to United, its successors and assigns, a royalty of five per cent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals

or values, of any and every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims; the payment of said five per cent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property, at the times and in the manner hereinafter provided: \* \* \* ”

“By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

“By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

“By net mint returns, as used herein, is meant the amount paid by any United States Mint, Branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.



“It is agreed that in addition to the deductions of railroad freight from Cascade, Idaho, to the smelter, market or mint, that Bradley shall also be allowed to deduct from the net smelter, market, or mint returns Two Dollars and Fifty Cents (\$2.50) per ton for each ton of concentrates, ores, metals, or values hauled or shipped from the above-described property to Cascade, Idaho, the said sum to be deducted from the net smelter, market or mint returns before net royalty herein provided for is computed.

“It is also agreed that in the event that concentrates or bullion are hauled or shipped by truck to a smelter, market, or mint beyond Cascade, Idaho, there shall be deducted from the net smelter, market, or mint returns the amount for trucking that it would have cost to ship the same by railroad from Cascade, Idaho, to the smelter, market, or mint to which the same are tracked.

“Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.

“It is agreed that reference in this instrument to ‘Cascade, Idaho,’ shall be deemed to include Cascade, McCall, or any nearby place from which shipment is made by rail.



“The above covenants on the part of Bradley to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to Bradley and shall be binding upon Bradley, its successors and assigns, forever.

“It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley, its successors, and assigns, and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.”

## VI.

That pursuant to said contract defendant mined, extracted and took from the mining properties, minerals, ores, metals and values consisting, among other things, of gold, silver, antimony and tungsten, and prior to commencement of operations of “The Yellow Pine Smelter” the marketable minerals, ores, metals and values were trucked to Cascade, Idaho, and there placed on railroad cars for shipment to smelters or reduction plants located in various parts of the United States not owned by either plaintiff or defendant, and in which neither party had any interest; that monthly statements were rendered by defendant to plaintiff with copies of smelter settlement sheets showing amounts received by defendant; and that defendant paid plaintiff

five per cent (5%) of the amounts received by defendant on the sale of such minerals, ores, metals and values; and that Exhibit 2 attached to plaintiff's Complaint (Plaintiff's Exhibit 24 herein) is a true copy of the statement rendered by defendant to plaintiff for the month of December, 1948.

That the same practice continued after July 1949 with respect to all shipments to smelters in which neither Bradley nor United had any interest.

## VII.

That in 1949 defendant completed the construction on the mining premises of "The Yellow Pine Smelter", at a cost in excess of Two Million Dollars, solely owned by defendant; that defendant operated said smelter and at the time of the commencement of this action was operating said smelter; that the cost of maintaining and operating said smelter has been borne exclusively by the defendant; that fifty-five (55%) per cent of the concentrates produced from the ores mined from the property were treated in The Yellow Pine Smelter and after completion of the smelting process certain of the products were sold by defendant to purchasers; that as to concentrates treated in the Yellow Pine Smelter defendant has not computed and paid royalties as demanded by plaintiff, in that as to concentrates treated at the Yellow Pine Smelter on the premises, defendant has not computed and paid royalties based upon sums received by it from sales of products resulting from the smelting process.

## VIII.

That exhibit 3 attached to plaintiff's complaint (Plaintiff's Exhibit 25 herein) is typical of the information furnished by defendant to plaintiff with respect to mined material passing through the Yellow Pine Smelter.

That defendant Bradley has paid plaintiff United royalty upon minerals, ores, metals and values passing into the Yellow Pine Smelter based upon net smelter returns in the manner typified by Exhibit 3, attached to the complaint (Plaintiff's Exhibit 25 herein).

## IX.

That an actual controversy exists between the plaintiff and defendant with respect to their rights and other legal relations under said agreements as follows:

1. The provisions of said agreement applicable to the computation and payment of royalties in respect to minerals, ores, metals and values smelted at said Yellow Pine Smelter.

2. The nature and extent of the obligation of defendant to furnish to plaintiff information that plaintiff may require to assure it that it is receiving the royalty to which it is entitled.

## X.

That the defendant completed construction of the Yellow Pine Smelter at its own costs and charges upon the mining claims during the year 1949 and

went into operation during July, 1949, and it has at all times been its sole property.

XI.

That the salable products resulting from concentrates processed at The Yellow Pine Smelter are held and retained by the Bradley Mining Company as its sole property until the same are sold to a purchaser.

XII.

That Bradley Mining Company has sold to purchasers salable products resulting from the smelting and reduction of minerals, ores, concentrates, metals and values from the said mining claims and smelted in the Yellow Pine Smelter.

XIII.

That from and after receipt by defendant of the net smelter returns from concentrates shipped to outside smelters defendant had no right, title or interest in or to such concentrates, the same being the property of said outside smelters.

XIV.

That the defendant has sold to purchasers salable products resulting from the smelting and reduction of minerals, ores, metals and values taken from the said mining claims and smelted in The Yellow Pine Smelter.

XV.

That defendant has not paid plaintiff sums equal to five per cent (5%) of the amount paid to de-

defendant by purchasers of products resulting from defendant's Yellow Pine Smelter operations.

#### XVI.

That the books and records of defendant correctly show the amount received by defendant as net smelter returns on all concentrates shipped to independent smelters.

#### XVII.

That the books and records of defendant correctly show that the royalties payable to the plaintiff on net smelter returns received by defendant, Bradley Mining Company, from independent smelters have been paid to the plaintiff.

#### XVIII.

That at the time of the execution of the contract, December 31, 1941, there were no smelters located at Cascade, Idaho.

#### XIX.

That the net smelter returns provisions of the "Conveyance, Royalty Agreement and Option" dated December 31, 1941, is applicable to the operations of the defendant at the Yellow Pine Smelter for ores, concentrates, metals and values taken from the claims described in the agreement, and the charges and deductions made by the defendant for smelting ores at the Yellow Pine Smelter have been proper and settlements made by the defendant have been correct as to the minerals, ores, metals and values processed at the smelter. That the defendant has paid to the plaintiff all royalties due it under



said agreement for or on account of any ores, concentrates, metals or values taken from the mining claims described in said contract and processed at the Yellow Pine Smelter.

## XX.

That there is no dispute as to the meaning and interpretation of the "net mint return" clause of the contract.

## XXI.

That before 1939 and thereafter at all times material to this action, it was the practice and custom in the smelting industry for companies who own and operate smelters also to own and operate mines; that it was likewise the practice and custom in the industry for companies owning mines and also owning smelters to ship their mine products to their own smelters; that it was likewise the practice and custom of owners of smelters and mines also to lease mining properties from other independent owners and send the products extracted therefrom to their own smelters and to settle for the products so shipped on the same basis as such smelting companies would settle with independent or custom shippers; that it was a practice and custom of the trade that where ores treated came from the mines owned by the owners of smelters, or came from mines leased and mined by the smelter owners, or came from independent custom shippers, that the smelting charges and the cost of transportation of concentrates to the smelter were deducted to arrive



at a net amount commonly referred to in the mining and smelting industries at "net smelter returns."

## XXII.

That it is a matter of common knowledge and historically recognized in the mining industry that the milling of ores to reduce such ores to a concentrate form is a part of the mining process and that the smelting of ores is not a part of the mining process.

## XXIII.

Tax problems were discussed during the negotiation of the 1941 agreement, including the problem of depletion, and the parties contracted with respect to these problems and with reference to existing laws. Section 114 (b) (4), B, U. S. Internal Revenue Code of 1939, made provision for depletion allowances computed upon the gross income from the property, and the statute defined the gross income from the property to mean the gross income from mining; and the definition of the term "mining" as contained in that section of the U. S. Internal Revenue Code, includes the ordinary treatment processes, which, according to the universal usage and custom in the mining industry are considered to be a part of mining, and excludes from the definition of "mining" additional process for purification and treatment of ores and minerals such as roasting, thermal or electric smelting, and refining.

## XXIV.

That at the time negotiations were initiated be-

tween plaintiff and defendant for the purpose of consummating the "Conveyance, Royalty Agreement and Option" dated December 31, 1941, (Defendant's Exhibit 7, Plaintiff's Exhibit 23), the plaintiff owned the mining property covered by the agreement of December 31, 1941, and the defendant was operating it under an Option to Purchase, dated May 16, 1939 (Defendant's Exhibit 5), by the terms of which the defendant was required to pay the plaintiff a royalty, on a schedule graduated upward from seven and one-half per cent ( $7\frac{1}{2}\%$ ) to ten per cent (10%) and then to twelve and one-half per cent ( $12\frac{1}{2}\%$ ) of all net smelter or net mint returns or net revenues as defined in the Option Agreement, on all concentrates, metals, ores and values extracted from the optioned mining claims; said Option Agreement providing in this respect as follows:

"The Optionee hereby agrees \* \* \*

"(c) To pay to the Optionor, at the time and in the manner hereinafter provided, the following royalties upon all ores, metals or values extracted from the mining grounds included in this option during the periods hereinafter named;

First: For the period from August 1st, 1939, and ending at midnight, July 31st, 1944, a royalty of seven and one-half per cent ( $7\frac{1}{2}\%$ ) upon all net smelter, or mint returns, or net revenues, as defined herein, on all concentrates, metals, ores and values extracted from said optioned mining claims;

Second: For the period beginning August 1st, 1944, and ending at midnight, July 31st, 1949, a

royalty of ten per cent (10%) upon all net smelter, or mint returns, or net revenues as defined herein on all concentrates, metals, ores and values extracted from said optioned mining claims;

Third: For the period beginning August 1st, 1949, and thereafter, a royalty of twelve and one-half per cent (12½%) upon all net smelter, or mint returns, or net revenues, as defined herein, on all concentrates, metals, ores and values extracted from said optioned mining claims."

"The said royalties shall be deposited by Optionee in the Crocker First National Bank of San Francisco, California, to and for the credit and order of said Optionor, on or before the twentieth (20th) day of the calendar months next succeeding the receipt of said net returns by Optionee, and the same to be so paid each and every month when there are any net smelter or mint or other returns until the purchase price of said mining claims and properties has been completed as herein provided. It is agreed that concentrates cannot be hauled from the property during the late fall, winter and early spring months, and that the time when the same shall be shipped during the summer months shall be determined by Optionee. It is understood, however, that should local reduction of the concentrates become practicable as determined by the Optionee, that no concentrates will be shipped."

"By net smelter returns, as used herein, is meant the amount received from the smelter from any ores, concentrates, metals, or values shipped to a smelter, it being understood that the smelter will deduct its

normal smelting charges, and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

“By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped less marketing and shipping costs from Cascade, Idaho.

By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.”

## XXV.

That said “Option Agreement” dated May 16, 1939 (Defendant’s Exhibit 5) was prepared by plaintiff’s attorney, O. W. Worthwine, an experienced mining attorney, and during the negotiations preceding the execution of said “Option Agreement” plaintiff’s attorney submitted a rough draft of certain pages of the proposed “Option Agreement” (Defendant’s Exhibit 5a) to Mr. John D. Bradley, Executive Vice President of defendant Bradley Mining Company, which said rough draft (Defendant’s Exhibit 5a) contained a definition of “net mill returns” to be used in connection with the computation of royalties payable to the plaintiff; and that Mr. Bradley crossed out the definition of “net mill returns”, for the reason that the defendant had other mineral products that were not covered by the “net mint” or “net smelter” clauses, because, as Mr. Bradley stated, the term “net milling” was not as broad as “net revenue” and would not cover

actual mercury processing and their might be high grade ore that would not be milled. That Mr. Bradley, after crossing out the definition of "net mill returns" as it appeared on Exhibit 5a, when first submitted to him, inserted in lieu thereof in his own handwriting, the definition of "net revenue" as the same appears in the "Option Agreement" of May 16, 1939, as executed by the plaintiff and defendant. And Mr. Bradley likewise inserted in the definition of "net smelter returns", in his own handwriting, after the word "received", the words "from the smelter"; and before the words "smelting charges" he inserted the word "normal"; and added to the last line of the definition, following the word "smelter", the words "shall also be deducted"; which changes, as made by Mr. Bradley, were incorporated in the "Option Agreement" of May 16, 1939, as executed by the defendant and plaintiff.

## XXVI.

That the purpose that the plaintiff and defendant had in setting or putting aside the "Option Agreement" dated May 16, 1939, (Defendant's Exhibit 5) and substituting therefor the "Conveyance, Royalty Agreement and Option", dated December 31, 1941 (Defendant's Exhibit 7, Plaintiff's Exhibit 23), and the economic reasons for negotiating and executing the agreement of December 31, 1941, were as follows:

a. The purpose of the defendant was to obtain a reduction in the amount of royalties required to be paid by the defendant to the plaintiff;



b. The purpose of the plaintiff, in agreeing to lower royalties in accordance with and as provided in the 1941 agreement, was to induce the defendant to carry on more intensive mining operations on the property and make it economically feasible and attractive for the defendant to mine low-grade ore.

### XXVII.

That a construction of the "Conveyance, Royalty Agreement and Option" dated December 31, 1941 (Defendant's Exhibit 7, Plaintiff's Exhibit 23), which would not entitle or permit the defendant to deduct its normal smelting charges before computing royalties on the products of the mining property processed and smelted at the Yellow Pine Smelter, would result in a substantial increase in the amount of royalty over that which would be payable if the defendant is entitled to compute the royalties payable to plaintiff on ores produced from defendant's property and processed at the Yellow Pine Smelter on the basis of "net smelter returns"; and that in itself would be a construction contrary to the purpose of the contract and contrary to plaintiff's avowed purpose at the time the contract was executed.

### XXVIII.

That during the negotiations which led up to the execution of the "Conveyance, Royalty Agreement and Option" dated December 31, 1941 (Defendant's Exhibit 7, Plaintiff's Exhibit 23), the possibility that the defendant might build a smelter at the site of the mine was discussed and both plaintiff and



defendant contemplated that the defendant might erect a smelter at the site of the mine; and in that contemplation the parties inserted in the contract the following provision:

“Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.”

### XXIX.

That at the time of the negotiation and execution of the “Conveyance, Royalty Agreement and Option”, dated December 31, 1941, (Defendant’s Exhibit 7, Plaintiff’s Exhibit 23) tungsten had been discovered upon the mining property. Substantial quantities of tungsten were shipped from the mining property during the fall of 1941. Tungsten ore was mined and taken from the property during the years 1941, 1942, 1943, 1944 and into the year 1945, and became the most important part of the mining operation in the history of the mine from beginning to end; and through all those years the defendant continued to treat tungsten ore mined from the property and send it direct to purchasers other than smelters. At the time the contract of 1941 was consummated, there was no custom or practice in the mining industry to send tungsten ore to a smelter.

### XXX.

During the period that the defendant was mining

and selling tungsten ore direct from the mine to purchasers, defendant made reports of all such sales to the plaintiff and paid royalty to the plaintiff on the proceeds of such sales, computed on the basis of the "net revenue" clause contained in the contract.

### XXXI.

Smelting, as commonly known and understood in the mining industry, consists of roasting, reduction and refining; and in the mining industry the heat treatment of quicksilver at the mine is not considered as smelting.

### XXXII.

During the time that the defendant was producing tungsten on the mining property, the mining of other minerals increased and the mining property had a greater production of antimony.

### XXXIII.

That crude ore, such as antimony and gold extracted from a mine in its native state with impurities, is first put through a mill or concentrator as a part of the mining process. The processing of concentrates at a smelter adds value to them, and is the final preparation of the product of the mine for the market. Processing and treatment of concentrates at a smelter is not known or considered in the mining industry as a part of mining; and it is the custom and practice in the industry for smelters, in purchasing antimony concentrates, to pay one-half of the gross value of the metal content in the concentrates.

## XXXIV.

The plaintiff and defendant, having in mind that the "Conveyance, Royalty Agreement and Option", dated December 31, 1941 (Defendant's Exhibit 7, Plaintiff's Exhibit 23), was to last for an unusually long period of time, envisioned not only present possible methods of marketing the current mine product from the property, but also the possible variety of minerals which possibly would be produced and marketed in the future, including gold, silver, antimony, tungsten and quicksilver. The emphasis in the contract upon market returns indicates, in the light of all of the other circumstances, that the parties had in mind all possible marketing methods. That as to any product that could go directly from the mine to the mint, the mint was the market. That as to any product of the mine required to go to a smelter, the smelter was the market. That as to other products of the mine, the "net revenue" provision was intended as a catch-all, another method of marketing direct from the property; and the provisions of the contract for the computation and payment of royalties by the defendant on the basis of "net revenue" and the definition of "net revenue", as contained in the contract, were carried over from the Option Agreement of May 16, 1939 (Defendant's Exhibit 5) and incorporated in the 1941 agreement, for the purpose of providing a basis for computing and paying royalties on all products of the mine that did not require processing at a smelter other than those marketed directly to the mint; and in particular to

provide a basis for computing and paying royalties on the sales of tungsten sold directly from the mine to the market and not to a smelter.

### XXXV.

That the plaintiff's construction of the 1941 contract, that is: that the defendant is not entitled to and does not have the right to deduct normal smelting charges before computing royalties upon products of the mine processed at the Yellow Pine Smelter, and that the plaintiff is entitled to a royalty upon the proceeds from the sales of all products of the mine after processing by the defendant at the Yellow Pine Smelter, would read out of the definition of "net smelter returns" as contained in the contract, the phrase

"\* \* \* it being understood that the smelter will deduct its normal smelting charges \* \* \*"

or it would necessarily read into the definition the words "third party owned smelter" or "outside smelter".

### XXXVI.

That the "Conveyance, Royalty Agreement and Option" dated December 31, 1941 (Defendant's Exhibit 7, Plaintiff's Exhibit 23) was drafted by O. W. Worthwine, acting as attorney for the plaintiff. John Parks Davis represented the defendant as its attorney, and the contract was made by experienced mining people, including Mr. Worthwine, the principal draftsman, and a party interested in the contract; and the parties contracted with reference to the practices and customs in the mining

industry prevailing at that time and as they envisioned such might be over the years.

### XXXVII.

That in 1943 the defendant constructed a purification plant at Boise, Idaho, known as the "Boise Purification Plant", for the purpose of treating and further purifying some of the tungsten extracted from the mining property, by removing phosphorus, antimony, sulphur, arsenic, and other impurities, before shipping it to market. The Boise Purification Plant was operated by the defendant for approximately two and one-half years, and during all of that period the defendant computed and paid royalties to the plaintiff on the proceeds of all sales of tungsten processed and treated at the Boise Purification Plant after deducting from the proceeds of such sales, operating costs, including depreciation; and submitted reports to the plaintiff each month with complete information as to all such sales, and deductions made by the defendant for operating costs and depreciation, as typified, by copy of invoice of tungsten shipment from Boise Purification Plant to Sylvania Electric Products Company dated May 23, 1945, with settlement sheet attached, dated July 14, 1945, showing deduction of operating costs, including depreciation (Plaintiff's Exhibit 29); and the plaintiff did not at any time make any objection to this method of settlement, or protest to the defendant about its right to deduct operating costs and depreciation before computing



royalties upon the sale of tungsten, after treatment in the Boise Purification Plant.

### XXXVIII.

The treatment by the defendant of tungsten at the Boise Purification Plant added value to the mined product and would not be considered in the mining industry as a part of mining, as that term is known in the industry; and the method of settlement by the defendant with the plaintiff with respect to the computation and payment of royalties payable upon tungsten treated and processed at the Boise Purification Plant was under the "net smelter returns" provisions of the contract.

### XXXIX

The plaintiff did not reply to letter from John D. Bradley, Executive Vice President of Bradley Mining Company to John J. Oberbillig, President of United Mercury Mines Company dated March 31, 1948 (Defendant's Exhibit 32), which contained the following statements and proposals:

"As Harold Bailey and I explained to you on March 12, 1948 in your office, we are planning on erecting at Stibnite a smelter for the local reduction of our antimony concentrates — our present plans also include locally reducing our gold concentrates in the future."

"Although I am positive that you fully appreciate the importance of such a move, still I am listing below the benefits of a smelter to the Yellow Pine Mining District as we see them at present."

"Upgrading of marginal ore bodies owing to

greater metal recoveries and payments will add longer life to the Yellow Pine Mine. At the present time we have approximately  $11\frac{1}{2}$  million tons of low-grade antimony-gold ore which can only be made profitable with a local smelter—undoubtedly, large additional tonnages of this type of material will be developed as we continue our drilling and other exploration program.”

“Under the present program of shipping raw concentrates, there is no pay for gold and silver in the antimony concentrates; and in the instances of the gold concentrates, there is little and sometimes no pay for the antimony contained in these concentrates—this situation will be corrected by the smelter installation.”

“According to the present Bradley Mining Co.-United Mercury Mines Co. contract, “normal smelting charges are to be deducted in arriving at “net smelter returns”. “Normal smelter charges”, as you know, are comprised not only of treatment charges but also metal and quotational gains. In fact, in the case of our antimony shipments the “normal smelting charges” are entirely quotational gains.”

“I believe you will agree with us that to arrive at “normal smelting charges” for our several different types of concentrates in the case of a local smelter can prove most complex over the ensuing years. Accordingly, I am proposing a simplified procedure for locally reduced concentrates—such procedure to be equivalent to the royalty you now receive on the present 5% basis when it is applied to the shipment of raw concentrates.”

“Although the following calculations show a variance for the equivalent royalty in the instance of sales of locally reduced products from 2.30% to 2.50% we have proposed that the rate for such products be set of 2.75%.”; and plaintiff did not make any objection or other response to any of the statements and proposals contained in said letter.

#### XL.

That on the 20th day of July, 1950, plaintiff and defendant entered into an agreement in writing modifying the terms of the contract of December 31, 1941, which agreement (Defendant’s Exhibit 6) was drafted by O. W. Worthwine as attorney for the plaintiff, and which agreement contains the following recitals:

“Whereas, the said Bradley Mining Co., did, on the 20th day of June, 1950, pay to the United Mercury Mines Company and said Oscar W. Worthwine the royalties due for the month of May, 1950;” \* \* \*

“It is further agreed that the said Bradley Mining Co. shall make the usual monthly reports as to moneys received by it during the preceding month upon which royalties would be payable, stating the amounts of royalties that had accrued, but, instead of sending the check as has been the practice during the past ten years, shall make a notation thereon to the effect that ‘the above accrued royalty has been postponed for a period of one (1) year from the .....day of....., 1950, to the ..... day of ....., 1951, at which time the same shall become payable’.”

And the evidence is uncontradicted that the royalty paid to the plaintiff upon products of the mine treated by the defendant at the Yellow Pine Smelter for the month of May, 1950, were computed and paid according to the "net smelter returns" method provided for by the contract of December 31, 1941. (Defendant's Exhibit 7, Plaintiff's Exhibit 23.)

### XLI.

That the defendant has computed and paid royalties to the plaintiff upon products of the mine treated and processed by the defendant at the Yellow Pine Smelter on the same basis and utilizing the same treatment schedule, but without deducting freight charges, as in the case of identical concentrates shipped to outside smelters; the net effect being that plaintiff benefited in royalty payments when identical concentrates were smelted by the defendant at the Yellow Pine Smelter as compared with the best arrangement that could be made with an independently owned smelter; and the plaintiff did not object to the payment of such royalties by the defendant upon the basis of "net smelter returns" until 1951.

### Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, the Court hereby finds and concludes:

#### I.

That the Court has jurisdiction of the parties and of the subject matter of the action.

## II.

That the proper and legal method for determining the amount of royalty due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941, for minerals, ores, metals and values extracted from the mining claims described therein and smelted by the Yellow Pine Smelter of the defendant is by the use of the "net smelter returns" provision as defined in the contract; and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of salable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by the defendant at the Yellow Pine Smelter.

## III.

That the defendant does not, as of March 21, 1957, owe plaintiff anything by way of royalties, or otherwise, for or on account of any ores, concentrates, metals or values taken from the mining claims described in said contract and processed at the Yellow Pine Smelter.

## IV.

That it is the duty of the defendant, under the terms of said contract, to furnish plaintiff information as to the amount paid by purchasers from the sale of minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine Smelter, and the marketing and shipping costs from Cascade, Idaho.



V.

That it is the duty of the defendant, and that the defendant be required, to furnish plaintiff all necessary information that it may require to enable it to determine that it is receiving the royalty to which it is entitled under the terms of said contract, and that the plaintiff have the right to inspect, examine and make copies of the books, records, and supporting data of the defendant, at least every six months, so as to enable plaintiff to determine that it is receiving the royalty to which it is entitled.

VI.

That each party shall bear its own costs.

It Is Hereby Ordered That a judgment be entered herein accordingly.

Dated this 20th day of April, 1957.

/s/ WM. C. MATHES,

Judge of the United States  
District Court.

[Endorsed]: Filed April 5, 1957.



It Is Ordered, Adjudged and Decreed:

I.

That the proper and legal method for determining the amount of royalty due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941, for minerals, ores, metals and values extracted from the mining claims described therein and smelted at the Yellow Pine Smelter of the defendant, is by the use of the "net smelter returns" provision as defined in the contract; and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of salable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by the defendant at the Yellow Pine Smelter.

II.

That the defendant is not indebted to the plaintiff, and the plaintiff is not entitled to recover from the defendant, as of March 21, 1957, any money by way of royalty, or otherwise, for or on account of any ores, concentrates, metals or values taken from the mining claims described in said "Conveyance, Royalty Agreement and Option" and processed at the Yellow Pine Smelter.

III.

That the defendant be, and it hereby is, required to furnish plaintiff with the amount paid by purchasers from the sale of minerals, ores, metals and

values extracted from said mining claims and smelted at the Yellow Pine Smelter, and the marketing and shipping costs from Cascade, Idaho.

#### IV.

That the defendant be, and it hereby is, required to furnish plaintiff all necessary information that it may require to enable it to determine that it is receiving the royalty to which it is entitled under the terms of said contract; and that the plaintiff shall have the right to inspect, examine and make copies of the books, records and supporting data of the defendant at least every six months, so as to enable plaintiff to determine that it is receiving the royalty to which it is entitled.

It Is Further Ordered, Adjudged and Decreed That each party to this action shall bear its own costs.

Dated this 20th day of April, 1957.

/s/ WM. C. MATHES,  
Judge of the United States  
District Court.

[Endorsed]: Lodged April 5, 1957. Filed April 24, 1957.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that United Mercury Mines Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 24th, 1957.

/s/ PAUL S. BOYD, by D. C.,  
P. O. Box 2084, Boise, Idaho,

/s/ E. H. CASTERLIN,  
P. O. Box 1384, Pocatello, Idaho,

/s/ DALE CLEMONS,  
Idaho Building, Boise, Idaho,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1957.

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[Title of District Court and Cause.]

### UNDERTAKING FOR COSTS

Whereas, the plaintiff in the above entitled action is about to appeal to the United States Court of Appeals for the Ninth Circuit, from a Judgment, Case No. 2854, entered against the plaintiff in said action, in said United States District Court, Southern Division, State of Idaho, in favor of Defendant in said action on the 24th day of April, 1957.

Now, Therefore, in consideration of the premises, the United States Fidelity & Guaranty Company of



Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to transact Surety business in the State of Idaho, does hereby undertake and promise to pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of said action, not exceeding the sum of Three Hundred and no/100 Dollars (\$300.00), to which amount the United States Fidelity & Guaranty Company of Maryland acknowledges itself bound.

Dated this 20th day of May, 1957.

THE UNITED STATES FIDELITY & GUARANTY CO.,

/s/ By .....

Attorney-in-Fact,

Countersigned:

.....

Agent at Boise, Idaho.

[Endorsed]: Filed May 20, 1957.

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[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above entitled Court:—

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure the Plaintiff-Appellant hereby designates the entire and complete record and proceedings in the above entitled matter for inclusion in the record on appeal in this action taken by the

Notice of Appeal filed herein on the 20th day of May, 1957.

/s/ PAUL S. BOYD, by D. C.,  
P. O. Box 2034, Boise, Idaho,  
/s/ E. H. CASTERLIN,  
P. O. Box 1384, Pocatello, Idaho,  
/s/ DALE CLEMONS,  
Idaho Building, Boise, Idaho,  
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 20, 1957.

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[Title of District Court and Cause.]

#### REPORTER'S PRAECIPE

To G. C. Vaughan, Official Reporter,—

Will you please prepare, certify and lodge a Reporter's transcript of the proceedings had in the above entitled Court on March 19th, 1957, pursuant to the rules of the Court.

We agree to pay the charges therefor.

/s/ PAUL S. BOYD, by D. C.,  
P. O. Box 2084, Boise, Idaho,  
/s/ E. H. CASTERLIN,  
P. O. Box 1384, Pocatello, Idaho,  
/s/ DALE CLEMONS,  
Idaho Building, Boise, Idaho,  
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify the foregoing papers to be the complete original record filed in this office in the above entitled case:

1. Complaint.
2. Motion for Enlargement of Time to Plead.
3. Stipulation Enlarging Time to Plead.
4. Order Approving Stipulation and Enlarging Time to Plead.
5. Answer.
6. Motion to Strike.
7. Notice of Motion for Summary Judgment.
8. Motion for Summary Judgment.
9. Motion to Strike Portions of Affidavit in Support of Summary Judgment.
10. Minutes of the court of November 29, 1951.
11. Affidavit of John D. Bradley.
12. Affidavit of Harold E. Lee.
13. Acknowledgment of Service.
14. Motion to Strike Portions of Affidavit of Harold E. Lee.
15. Affidavit of John J. Oberbillig.
16. Stipulation to withdraw certain sentences from affidavit of John J. Oberbillig.
17. Minutes of the court of Feb. 25, 1952.
18. Minutes of the court of Sep. 5, 1952.

19. Withdrawal of Attorney Maurice H. Greene.
20. Minutes of the court of Oct. 10, 1952.
21. Memorandum Opinion of Judge Healy.
22. Request for Admissions.
23. Defendant's Response to Request for Admissions.
24. Interrogatories by Plaintiff.
25. Notice of Hearing Objections to Interrogatories.
26. Defendant's Answers to Plaintiff's Interrogatories.
27. Defendant's Objections to Certain Interrogatories.
28. Motion for Production, Inspection and Copying.
29. Motion for Protective Order Limiting Scope of Order for Production, etc.
30. Notice of Hearing Motion for Protective Order, etc.
31. Order to submit Objections on briefs and argument.
32. Order to submit Motion to limit scope upon briefs, etc.
33. Memorandum Decision of Judge Healy.
34. Defendant's Answers to Plaintiff's Interrogatories.
35. Plaintiff's Request for Admissions.
36. Request for Admissions under Rule No. 36.
37. Response to Request for Admissions.
38. Response to Request for Admissions under Rule No. 36.
39. Minutes of the court of Feb. 1, 1955.

40. Judgment.
41. Notice of Appeal.
42. Cost Bond.
43. Designation of Contents of Record on Appeal.
44. Reporter's Transcript.
45. Praecipe for Reporter's Transcript.
46. Statement of Points.
47. Mandate from the United States Court of Appeals.
48. Satisfaction of Judgment for Costs.
49. Interrogatories by Plaintiff.
50. Notice of Hearing Objections to Interrogatories, with Objections attached.
51. Defendant's Answer to Plaintiff's Interrogatories.
52. Praecipe for Appearance of Robert E. Brown as an attorney for the defendant.
53. Notice of Motion to Produce.
54. Motion to Produce.
55. Minutes of the Court of Aug. 17, 1956.
56. Stipulation for Taking of deposition of John J. Oberbillig.
57. Order to remove Stipulation and attach same to deposition of John J. Oberbillig.
58. Minutes of the court of Feb. 19, 1957.
59. Reporter's Transcript of Pre-Trial Conference.
60. Pre-Trial Conference Order.
61. Minutes of the Court of March 19, 1957.
62. Minutes of the Court of March 20, 1957.
63. Minutes of the Court of March 21, 1957.



64. Affidavit of Service of Proposed Findings of Fact and Conclusions of Law, and Judgment.

65. Findings of Fact and Conclusions of Law.

66. Judgment.

67. Notice of Appeal.

68. Undertaking for Costs.

69. Designation of Record on Appeal.

70. Reporter's Praecept.

71. Order Extending Time for docketing appeal.

72. Reporter's Transcript (Judge's opinion of 3/21/57 included).

73. Original Exhibits.

(4) Agreement dated 10/3/30 (Admitted as excluded evidence).

(5) Option Agreement—May 16, 1939.

(5-a) Draft of proposed contract.

(6) Agreement dated 7/20/50.

(7) Agreement dated 12/31/41 (Attached to original Complaint).

(11) Copy of letter dated 4/14/48.

(21) Original letter dated 12/30/41 (Admitted as excluded evidence).

(22) Original letter dated 12/30/41 (Admitted as excluded evidence).

(23) Agreement dated 12/31/41 (On page 12 of Transcript of Record of former appeal. Same as Exhibit 7).

(24) 5 pages of Exhibit 2 attached to original Complaint (Also on pages 27, 28, 29, 30 and 31 of Transcript of Record of former appeal).

(25) Part of Exhibit 3 attached to original Com-

plaint (Also on pages 32 to 40 of Transcript of Record of former appeal).

(26) Plaintiff's Request for Admissions (Page 179 of Transcript of Record of former appeal).

(26-a) Response to Request for Admissions (Page 184 of Transcript of Record of former appeal).

(27) Interrogatories by plaintiff (Page 149 of Transcript of Record of former appeal).

(27-a) Defendant's Answer to Plaintiff's Interrogatories (Page 151 of Transcript of Record of former appeal).

(27-b) Defendant's Answers to Plaintiff's Interrogatories (Page 166 of Transcript of Record of former appeal).

(28) Request for Admission 2(q) (Page 145 of Transcript of Record of former appeal).

(28-a) Response to Request for Admission 2(q) (Page 148 of Transcript of Record of former appeal).

(29) Copy invoice of shipment of Tungsten dated 5/23/45.

(30) Pre-Trial Conference Order filed March 11, 1957. (With original file.)

(31) Letter dated 12/2/48.

(32) Letter dated 3/31/48.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of July, 1957.

[Seal]      /s/ ED M. BRYAN,  
Clerk.

In the United States District Court for the District  
of Idaho, Southern Division

No. 2854

UNITED MERCURY MINES COMPANY, a  
Corporation, Plaintiff,

vs.

BRADLEY MINING COMPANY, a Corporation,  
Defendant.

### TRANSCRIPT OF PROCEEDINGS

This matter came on for hearing before the Honorable William C. Mathes, United States District Judge, sitting without a jury, at Boise, Idaho, on March 19, 1957.

Appearances: E. H. Casterlin, Esq., Pocatello, Idaho, Paul S. Boyd, Esq., Boise, Idaho, Dale Clemons, Esq., Boise, Idaho, Attorneys for the Plaintiff. John Parks Davis, Esq., San Francisco, California, Paul H. Ray, Esq., Salt Lake City, Utah, G. A. Marr, Esq., Salt Lake City, Utah, Robert E. Brown, Esq., Kellogg, Idaho, Ralph R. Breashears, Esq., Boise, Idaho, Attorneys for the Defendant. [1]\*

March 19, 1957

10:00 O'Clock A.M.

Mr. Casterlin: May we inquire if the Pre-trial Order, as prepared and sent down, has been signed?

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\* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

The Court: Yes, I should have said it has been signed as presented. I made one or two purely typographical corrections, or corrections of typographical errors. They are so minor that I don't even find them now. I think I recall that one was where I simply added an "s".

Mr. Casterlin: Could that be on Page Six, your Honor, near the end of Paragraph L, I notice one letter has been deleted. It is at the top of the page, in the third line.

The Court: No, I missed that one, that word is obviously meant to be mining. I had in mind that I had made one or two minor corrections, but I don't see them. I had in mind that there was some word that should have been plural and it was singular, and I put an "s" at the end of it. Here it is, it is at the bottom of Page Thirteen, it read "The foregoing admission of fact" and I figured that should be admissions, that is the change that I made. There is one matter that I perhaps should mention at this juncture, and that is referred to under Paragraph Q on Page Six, and that reads, in the Pre-trial Order, "That, if under the terms [3] of the contract, Defendant, Bradley Mining Company, is entitled to make any charge or deduction for smelting ores in the Yellow Pine Smelter, the charges and deductions so made by Bradley Mining Company have been proper charges and deductions and all settlements made with the plaintiff have been correct." As I read that it means that if any smelter charges at all were deducted, which have been deducted by the defendant, cover-

ing the smelting of ores in the Yellow Pine Smelter, have been reasonable and necessary and there is no issue as to the smelter charges as such.

Mr. Boyd: At this time, if the Court please, we desire to move, or rather we desire to have the record show, in order to protect ourselves,—there appears to be some difference of understanding between counsel—my understanding is that we have to save all objections as to relevancy, materiality and competency here throughout the entire record, except those matters that are specifically stipulated, and that you reserve all other objections as to materiality.

Mr. Casterlin: Yes, everything is reserved except what is waived.

The Court: That is covered by Paragraph b or sub-paragraph b in Paragraph IV at the top of Page Eight. [4]

Mr. Boyd: In Paragraph Q on Page Six, we have included the words “have been proper charges and deductions”, and we have taken the position that these records apply only to the charges that were proper and that were properly reported to us,—as to materials reported to us, and not as to any other material or any other product here that has not been reported, or course, we are not stipulating to that as we have no knowledge.

The Court: Is there any that has not been reported?

Mr. Boyd: I do not know, and neither does co-counsel, we have talked to our client and he doesn't know. However, if there is something that



comes up we would not want to be foreclosed from going into the matter.

The Court: But as to any ore with respect to which there has been some report following the smelter process, you accept the smelter charges by the Plaintiff, do you,—the charges made by the Defendant against the Plaintiffs?

Mr. Boyd: As far as reported, that is exactly as we have it in our Stipulation.

The Court: And the result would be, as I see it, if the contract is interpreted in the way the Defendant contends, namely, that the smelter returns are all covered, then the Judgment will be [5] for the Defendant without any recovery at all by the Plaintiff.

Mr. Boyd: But we still have the accounting.

The Court: Then Paragraph Q only covers, shall I say, the rate of smelter charges, is that it? In other words, the charge that the defendant has made for smelting was a reasonable and necessary charge, is that the purport of Paragraph Q?

Mr. Casterlin: I think that Paragraph Q, as far as this discussion is concerned, provides that the charges, so far as reported, are correct, but if there is anything not reported, anything that we have no knowledge of, we are not saying as to the correctness of that.

The Court: To put it another way, whatever charges the defendant has deducted on the reports heretofore made, for smelting charges, are stipulated to be reasonable, necessary and proper.

Mr. Casterlin: Yes, so far as reported.

Mr. Breshears: Now, your Honor, I would like to say something on that. That question was raised for the first time when we came to consider the final draft of this Pre-trial Order. If your Honor will remember, the Court discussed this matter quite at length with counsel at the time of the Pre-trial Conference, and it is specifically [6] stipulated in the record of the Pre-trial Conference that if it is ultimately determined that our theory is correct, that we are entitled, or required to pay royalties only on net smelter returns, that all settlements that have been made are correct without qualification, and that stipulation is in the record.

The Court: I don't understand that the Plaintiff seeks to depart from that at all. He merely takes the position, as I understand it here now, that if there are any ores that have been smelted on which no report has been made, they have not seen the deductions for the smelting charges and therefore they cannot say whether they are reasonable, but I assume that if they are at the same rate as those which the Defendant reported and proved then the Plaintiff would be bound by it as being a reasonable and necessary rate.

Mr. Breshears: My understanding from conferences with them was that they were not conceding that everything was reported by Bradley that went into that smelter, and the purpose of the Stipulation was to eliminate any question of accounting as to what went through the smelter, and they have had some six years to determine whether or not Bradley reported everything, and there is an Order

in the files authorizing them to examine our books.

The Court: Is there any contention by the Plaintiff, and is it the contention now, that there have been ores go through the smelter upon which there have been no reports to the Plaintiff?

Mr. Casterlin: It is our position that we don't know.

The Court: You want to reserve it as a precautionary reservation that proof might develop something, is that it?

Mr. Casterlin: Yes, but there is no hedging on the settlement so far as the settlement sheets are concerned that have been submitted.

The Court: I don't think that this is anything that we need to take any time with, Gentlemen. It is my own view that if some such matters should develop and the same rate or smelting charge was applied to that, then the Plaintiff would be bound as to the reasonableness and necessity of that charge, otherwise, if something should develop that has not been reported then the Court would be inclined to release the Plaintiff from the stipulation. Literally, however, Q might foreclose the Plaintiff.

Mr. Breshears: I think they are foreclosed by the Stipulation on Page 45 of the record.

The Court: That may be so, but if the proof should show that there have been ores go through [8] that smelter upon which there was no accounting, then the Court would be inclined to relieve the Plaintiff from the Stipulation, but, as I understand it now, there is no contention that there were any. Does the Plaintiff have any further

proof to offer besides the Pre-trial Conference Order?

Mr. Casterlin: I understand that we have reservation upon everything that has not been waived.

The Court: As it stands now, does the Plaintiff wish to offer in evidence any admissions in the Pre-trial Conference Order?

Mr. Casterlin: Yes.

The Court: Do you wish to offer in evidence all of the admissions in the Pre-trial Conference Order?

Mr. Casterlin: Yes.

The Court: Do you wish to offer in evidence the entire Pre-trial Conference Order?

Mr. Casterlin: I think possibly I misunderstood your Honor, no, the Pre-trial Order stands in the record by itself, so as to the admissions in there we do not intend to encumber the record with any evidence or any documents whatsoever.

The Court: Then does the Plaintiff have any evidence to offer further? [9]

Mr. Casterlin: We will call Mr. Bryan, the Clerk, with the original files.

ED. M. BRYAN

Called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Casterlin): Will you state your name for the record?      A. Ed. M. Bryan.

Q. You are the Clerk of this Court?

(Testimony of Ed. M. Bryan.)

A. Yes, sir.

Q. Do you have with you the original files in the case which is now pending?      A. Yes, sir.

Q. Will you identify the Complaint, if you please?

A. The Complaint was filed on July 12, 1951.

Mr. Casterlin: We now offer in evidence Exhibit 1, which is attached to the Complaint, which is the contract of December 31, 1941.

The Court: As amended by interlineation.

Mr. Casterlin: As amended by interlineation.

The Court: It may be admitted.

Mr. Bryan: Your Honor, we usually mark [10] these exhibits consecutively and I was wondering if we could mark this as Plaintiff's Exhibit Number 23, since we have 22 exhibits by the Defendant.

The Court: Is there any objection to that?

Mr. Casterlin: No sir, none.

The Court: Then it is so ordered, this will be exhibit number 23. The contract isn't listed in the exhibits, is that right?

Mr. Casterlin: No.

The Court: Isn't it Exhibit Number 7?

Mr. Brown: Defendant's Exhibit 7?

The Court: It is listed in the Pre-trial Conference Order, and I wonder if there is any objection to marking it as Exhibit Number 7 here?

Mr. Casterlin: No objection to that.

The Court: Then we finally have it marked correctly as Exhibit Number 7 in evidence, that is the



December 31st, 1941 contract, the contract in controversy.

[Note: Exhibit No. 7 is the same as Exhibit No. 1 set out at pages 12-26 of this printed record.]

Mr. Casterlin: We now offer in evidence Exhibit Number 2 attached to the Complaint, which is a sample monthly statement settlement sheets.

The Court: Is that marked in the Pre-trial Conference Order? [11]

Mr. Casterlin: No, it is not, your Honor, and I suggest that be marked as Exhibit Number 24, Plaintiff's Exhibit 24.

The Court: I believe that is mentioned somewhere in the Pre-trial Conference Order, isn't it?

Mr. Boyd: Would that be under 4 E?

Mr. Brown: Yes, I think that's right.

Mr. Casterlin: That is an agreement that the exhibit is typical, that is all that is referred to there.

The Court: Then if it is not marked, it may be Exhibit Number 24 in evidence.

Mr. Ray: May I inquire how many sheets there are to that exhibit.

The Court: Is that the same as Exhibit 2 attached to the Complaint?

Mr. Casterlin: Exhibit 7 is the same as Exhibit 1.

The Court: And Exhibit 24, last received, is the same as Exhibit 2, to the Complaint. As I understand it, Mr. Ray is inquiring as to how many sheets comprise Exhibit Number 24. [12]

Mr. Casterlin: These exhibits all appear in the transcript of the Circuit Court of Appeals Opinion.

Mr. Ray: We have no objection to Exhibit Number 24.

The Court: Very well. The Clerk advises that there are twelve sheets comprising Exhibit Number 24.

Mr. Ray: The reason I inquired of that was that I thought he was referring to the material reproduced in the Transcript of the Record of the Circuit Court of Appeals, there are many sheets but I believe five of them in this record are identified as Exhibit Number 2.

The Court: The Clerk states that the figure twelve was a misapprehension on his part, and now he wants to make a count of the number.

Mr. Casterlin: It is apparent now, if the Court please, that in printing the Circuit Court record we did not print all of Exhibit 2, I will now, with consent of counsel, limit Exhibit Number 2 to the exhibit as printed in the Transcript of the Circuit Court, which eliminated a good many of these pages.

The Court: Do you have an extra copy of that record that the Clerk may have?

Mr. Casterlin: Yes, there is an extra copy. [13]

The Court: And I understand this is on Page 27 of the record?

Mr. Casterlin: Page 27.

The Court: Then the five sheets that appear following Page 27 of the record of the Transcript of the Court of Appeals of the Ninth Circuit shall

comprise Exhibit Number 24 in evidence here in lieu of the large number of pages that appears in Exhibit 2 attached to the Complaint.

Mr. Casterlin: I will offer it in that way.

Mr. Ray: And we have no objection.

The Court: Very well, it may be received.

Mr. Casterlin: We now offer as Exhibit Number 25 what is designated as Exhibit Number 3 attached to the Complaint. The same appearing in the Transcript of the record of the Circuit Court of Appeals at Page 32 to 40, inclusive. The same being a sample statement from the Bradley Mining Company to the United, and illustrative of the computation of royalties on concentrates smelted at the Yellow Pine smelter.

Mr. Ray: It seems to me that the material you refer to also are settlement sheets of other smelters.

Mr. Casterlin: Which were submitted by [14] Bradley to the United.

Mr. Ray: We have no objection.

The Court: As I understand it, this is offered as being an exemplar or typical of the report of the information furnished by the defendant to the plaintiff with respect to mined material passing through the Yellow Pine smelter.

Mr. Casterlin: That is correct.

The Court: There being no objection it may be received in evidence. Is that the same as Exhibit 3 in the Complaint?

Mr. Casterlin: Yes, limited, however, to certain pages.

The Court: Such portions as appear in the Transcript on appeal.

Mr. Casterlin: Yes.

The Court: Very well, and that is designated as Exhibit Number 25 here.

Mr. Casterlin: I now offer Plaintiff's Requests for Admission, which was filed October 15, 1954, and which appears in the Transcript of the record of the Circuit Court of Appeals on Page 179.

The Court: Do the answers appear as a part of that document?

Mr. Casterlin: No, your Honor, these are [15] just the requests.

The Court: Is there any objection?

Mr. Ray: No objection.

The Court: It may be received as Exhibit 26.

Mr. Casterlin: We now offer in evidence the answers to the same requests, which were filed November 2, 1954, and which appear in the Transcript at Page 184,—the Transcript of the record of the Court of Appeals.

The Court: If there is no objection it will be received as Exhibit 26A.

Mr. Casterlin: In this connection, if Counsel please, these two letters to which reference is made in the request are copies, and they are signed by J. D. B. in both instances, referring to Page 179, 180, of the record, which is a letter dated January 29, 1942, to Mr. George K. Dorsey from J. D. B. Is there any question as to J. D. B. is?

Mr. Ray: There is no question as to that, Mr. Casterlin, J. D. B. is John D. Bradley.

Mr. Casterlin: And at the time he was President of the Bradley Mining Company, was he?

Mr. Ray: At what time is that?

Mr. Casterlin: On January 29, 1942. [16]

Mr. Ray: He was at that time Executive Vice-President.

Mr. Casterlin: Executive Vice-President.

The Court: And is that so stipulated by both parties?

Mr. Casterlin: Yes, we accept that. Now then, referring to Page 181 of the Transcript and the letter dated March 17, 1947, addressed to Mr. John J. Oberbillig, and signed John D. Bradley, Executive Vice-President, there is no question about his official capacity with the Bradley Mining Company at that time, I take it.

Mr. Ray: No, none.

Mr. Casterlin: Now then, Counsel, these Requests for Admission and Answers set forth copies of the letters, do you insist that we furnish copies of these Exhibits or that the copies in the Requests and the Answers may serve for that purpose?

Mr. Ray: We would not require you to furnish us additional copies if we have them, Mr. Casterlin.

Mr. Casterlin: The admission is that the letters are genuine, I was just trying to avoid encumbering the record. [17]

Mr. Ray: And with the offer of these, we reserve the objection to their relevancy, we still have that reservation.

Mr. Casterlin: Yes, that is understood.

The Court: Now, if they come in as a part of



the Requests for Admissions and the Answers thereto, perhaps we should rule on those objections now. I have received the Requests for Admissions as Exhibit Number 26, and you now talk about objections, is there any objection to that Exhibit, to those Requests?

Mr. Ray: To the introduction of the Requests?

The Court: Yes.

Mr. Ray: No, there is none.

The Court: Now then, let me inquire, are the letters attached to the Requests?

Mr. Casterlin: Yes.

The Court: And is there any objection to the Answers which have been received as Exhibit 26A. As I would interpret it, the receipt of the Requests would bring in the documents attached.

Mr. Ray: You are now talking about the letters on Page 180?

Mr. Casterlin: Yes.

Mr. Ray: We don't object to that. [18]

The Court: Very well. Then the Requests, Exhibit 26, and the Answers, Exhibit 26A, are in evidence with all of the Exhibits thereto attached.

[See page 398.]

Mr. Casterlin: We now offer in evidence Plaintiff's Interrogatories filed November 2, 1953, which appear in the Transcript at Page 149, and that is offered as Exhibit Number 27.

The Court: Plaintiff's Interrogatories filed November 2, 1953?

Mr. Casterlin: Yes.

The Court: Is there any objection?

Mr. Ray: No objection.

The Court: That is received in evidence as Exhibit Number 27.

[See page 399.]

Mr. Casterlin: We now offer as Plaintiff's Exhibit Number 27A, the Defendant's Answers to the same Interrogatories, filed November 10, 1953, which appear in the record of the Circuit Court at Page 151.

Mr. Ray: We have no objection.

The Court: Received in evidence as Plaintiff's Exhibit 27A.

[See page 401.]

Mr. Casterlin: We now offer in evidence as Exhibit Number 27B, which are the Defendant's Answers to the same Interrogatories——

The Court: ——Further answers? [19]

Mr. Casterlin: Yes. Filed on May the 17th, 1954, and appear in the record of the Circuit Court at Page 166.

The Court: Is there any objection to the further Answers?

Mr. Casterlin: The fact is that when we submitted the Interrogatories they answered some and objected to others, and these further Answers are the answers to the ones that they objected to in the first place.

Mr. Ray: No, we don't object.

The Court: The further Answers, last identified as Exhibit 27B, are received in evidence.

[See page 404.]

Mr. Bryan: May I interrupt, please?

The Court: Yes, you may.

Mr. Bryan: According to the record, this record, Defendant's Answers were filed November 2, 1953, instead of November 10, that is Exhibit 27A.

The Court: According to my note, Exhibit 27, Plaintiff's Interrogatories were filed November 2, 1953, and the Answers wouldn't likely be filed the same day.

Mr. Bryan: There is just a month difference, your Honor. One was October 2nd and the other November 2nd.

The Court: The Interrogatories, Exhibit 27, were filed October 2? [20]

Mr. Bryan: Yes sir, according to this, I am looking at the Transcript.

The Court: And that is what you are going by, is it, Gentlemen, the Transcript?

Mr. Casterlin: That's right.

The Court: Then Exhibit 27A, the Answers, were filed a month later, November 2.

Mr. Casterlin: Yes, that seems to be correct.

The Court: And Exhibit 27B, further Answers, were filed May 17, 1954.

Mr. Bryan: That is correct, according to this.

The Court: Now, go ahead with the next, Mr. Casterlin.

Mr. Casterlin: Now, if the Court please, I offer in evidence Requests for Admission Q,—Subdivision Q, filed September 17, 1953, which appears at Page 145 of the Transcript.

The Court: Plaintiff's Request Q, is that it?

Mr. Casterlin: Yes.

The Court: Just the single request?

Mr. Casterlin: Yes, just the single request. [21]

The Court: Is there any objection?

Mr. Ray: No objection.

The Court: That would be Exhibit 28, would it, Mr. Casterlin?

Mr. Casterlin: Yes, Exhibit 28.

The Court: Exhibit 28 is received in evidence.

[See page 408.]

Mr. Casterlin: We now offer in evidence Defendant's Response to the Request, which appears on Page 148 of the Transcript, under Subdivision request number two, Q.

The Court: Do you have the date of filing on that?

Mr. Casterlin: Filed October 2, 1953.

The Court: Is there any objection to that Exhibit, to the Response?

Mr. Ray: We do not object to it.

The Court: Very well, received in evidence as Exhibit 28A.

[See page 413.]

Mr. Casterlin: The Plaintiff rests.

The Court: You may proceed, Gentlemen, on behalf of the Defendants.

Mr. Ray: We would like to have Mr. John D. Bradley sworn. [22]

JOHN DAVIS BRADLEY

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Ray): Did you give your name, Mr. Bradley?      A. Yes sir, I did.

Q. Where do you live?

A. My residence is Burlingame, California.

Q. What connection have you with the defendant, Bradley Mining Company?

A. I am an Executive Vice President of the Bradley Mining Company.

Q. Presently are you associated with any other mining company?

A. Yes, the Bunker Hill Company.

Q. What is the Bunker Hill Company?

A. The Bunker Hill Company is a lead and zinc mining and smelting company.

Q. Where does it operate?

A. It operates in northern Idaho.

Q. What is your connection with the Bunker Hill Company?

A. I am President of the Bunker Hill Company.

Q. According to the correspondence now in the record there is reference to F. W. or Fred Bradley. Who was he?      A. He was my father. [23]

Q. What was his business?

A. His business was mining.

Q. How old are you, Mr. Bradley?

A. I am 46.



(Testimony of John Davis Bradley.)

Q. What was your first contact with mining, Mr. Bradley, and where was it?

A. I think my first contact was probably at the age of six or seven that I can recollect. I don't know how far back you want to go, Mr. Ray.

Q. Have you been associated more or less with mining ever since your early childhood?

A. Yes, I have.

Q. When did you first perform any work in and around mining?

A. At the age of thirteen.

Q. Where was that?

A. At The Spanish Mine near Grass Valley, California.

Q. And what was the nature of that mine?

A. That was a gold mine.

Q. Were you working there during vacation?

A. Yes.

Q. Vacation from school?

A. Yes, I worked there during the summer and Christmas vacations.

Q. And did you ultimately enter a mining school?      A. Yes.

Q. Where was that? [24]

A. The School of Mines at the University of California.

Q. What was your course of study?

A. Mining engineering.

Q. Were you graduated from that school?

A. Yes, in 1933 with a B.S. in Mining Engineering.

(Testimony of John Davis Bradley.)

Q. In 1933?            A. Yes.

Q. And following your graduation——

Mr. Casterlin: ——We will admit the witness' qualification as a mining engineer.

Mr. Ray: I am glad to know that and to accept that offer, but I do want to show his relation with mining and mines and with the mining customs that followed.

The Court: Can it be stipulated that he is a qualified mining engineer, and not only that, but that he is familiar with the custom and practices of mining in the State of Idaho?

Mr. Casterlin: Yes, we will admit that with the reservation that the custom in the mining industry is immaterial in this case, on the authority of the Idaho cases, and further that the custom and practice is not an issue in this case, and thirdly, that the custom and practice does not become important in any event until it is first established that the [25] contract is uncertain, ambiguous and unintelligible.

The Court: Now, is it stipulated that this witness was familiar with the custom and the practices in the mining industry in Idaho during the period of the formation of the contract in suit here? Perhaps the period can be fixed, I will ask this. During what period have you been familiar with the custom and practice?

Mr. Ray: That is what I would like to follow up.

The Court: Perhaps we would save time—let

(Testimony of John Davis Bradley.)

me ask again, what period have you been familiar with the custom and practices of the mining industry in the State of Idaho?

A. In the early thirties.

The Court: Since the early 1930's?

A. Yes sir.

The Court: Will the plaintiff so stipulate?

Mr. Casterlin: Yes.

Q. (By Mr. Ray): In connection with the mining industry, following your graduation from college, where did you work?

A. I worked in North Idaho and also in Grass Valley.

Q. What were the products produced in the Grass Valley property? [26]

A. We produced gold in a concentrate form and also in bullion form. In other words, we had an oxidized ore which we cyanided and recovered the gold, and we also had a sulfadized ore where, in addition to recovering the gold and silver, we recovered zinc.

Q. How was the gold disposed of, the bullion?

A. The bullion was sold to the mint.

Q. During what years was that, Mr. Bradley, the middle thirties?

A. Yes, the middle thirties.

Q. So, you became familiar at that time with the sale of bullion produced at the Grass Valley Mine to the mint?

A. That's right. We also produced a crude barite at this property.

(Testimony of John Davis Bradley.)

Q. You mentioned gold concentrates, gold bullion and barite, how did you dispose of the concentrates?

A. The gold concentrates were sold to the American Smelting and Refining Company plant at Selby, California.

Q. And how were you paid for that?

A. On the basis of net smelter returns.

Q. Now, was the barite shipped to a smelter?

A. No.

Q. How was it disposed of?

A. It was sold in its crude form, and sold to one of the National Lead Company subsidiaries near Modesto. [27]

Q. So that you had material set forth there that was sold on a mint basis, on a net smelter return basis, and on a mixed?      A. Correct.

Q. The barite was shipped and settled for neither on a mint returns nor net smelter returns?

A. That is correct.

Q. Now then, Mr. Bradley, where else, before you became active in the mining industry in Idaho, did you pursue mining in California?

A. Well, in my younger days I was familiar with tungsten mining in the Mojave Desert, but from an executive or a management standpoint, it was more limited to the Spanish Mine near Grass Valley, the San Juan Mine near Grass Valley, which was a direct shipping mine, we didn't concentrate, and then in the quicksilver mines in California, Oregon and Nevada.

(Testimony of John Davis Bradley.)

Mr. Casterlin: May I inquire, if the Court please, if this testimony is offered for the purpose of qualifying the witness as to his experience?

Mr. Ray: It is offered for that purpose and for the additional reason that we understand that the case is here and the principal issue for the Court to decide is what the parties meant by this contract, and the evidence is offered so that we may, as nearly as possible, place the Court in the situation that the parties were in when they made the contract, and that includes the background, [28] the mineral knowledge and mining knowledge of the parties.

The Court: It would not be the subjective position, it would be the objective would it not, it would be the intention of both parties and not the intention of just one.

Mr. Ray: That is right, your Honor, but we can't get it all at one time.

Mr. Casterlin: If it is offered for that purpose, I think I will make the objection that it is incompetent, irrelevant and immaterial for any purpose whatsoever until it is first established that the contract in question, which is up for interpretation, is uncertain, ambiguous, and unintelligible, and requires interpretation as to its meaning.

The Court: I have ruled that the contract requires interpretation, it doesn't take much to require interpretation as I understand it, but I haven't ruled on this specific problem.

Mr. Casterlin: Is it the Court's position,—and



(Testimony of John Davis Bradley.)

this is to clarify it in my own mind,—is it the Court's position that the question here is the ambiguity of the language of the contract or the uncertainty of the application of the clear, plain and simple language as to the operation of the Yellow Pine smelter.

The Court: It may be both. [29] Judge Healey interpreted the contract one way and Judge Denman and his associates appeared to take a different view, in any event, however the situation may be with respect to the ambiguity of the language as such, the so-called royalty as applied to the situation which developed, namely, following the construction of the Yellow Pine smelter, as applied to that, the contract is ambiguous.

Mr. Casterlin: The contention here, as I understand it, is whether the language of the contract, which is clear, plan and defined by agreement of the parties, is applicable to the Yellow Pine smelter.

The Court: I don't know whether I can subscribe to that portion, that it is clear, plain and defined, as you say, but I will rule that it applies and would apply to a situation comparable here, namely, what payments were to be made by the defendant for the product of this mine that has been run through the Yellow Pine smelter. The contract is not clear, it is ambiguous, but even if that situation didn't exist, if there was a dispute between the parties as to the meaning of the contract I would rule that the circumstances surround-

(Testimony of John Davis Bradley.)

ing the execution would be admissible to aid in the interpretation because of the dispute, even though the Court might think that there was no ambiguity at all.

Mr. Casterlin: I will agree with the Court's [30] statement, so far there hasn't appeared any uncertainty between the parties as to the definition of the terms in the contract, which they have placed on those terms by their own language.

The Court: As to the meaning of the contract, as to the royalty provision, shall I say, as applied to the products put through the Yellow Pine smelter, that would be admissible.

Mr. Casterlin: I understand that there is no dispute as to the clarity of the terms as to what net revenue means, as to what net smelter returns means, and what net mint returns means, because the parties, by agreement, have defined them.

The Court: As far as this witness' background is concerned, it is relevant, only in the issue as to his qualifications as an expert. His background and experience would be relevant as to that, but I should not say that it would be relevant to any of the issues involved here, except as it might affect his qualifications to testify as an expert.

Mr. Casterlin: That is the reason I inquired as to the purpose of this line of questioning and answers.

The Court: The record shows the admission by counsel of his qualifications, but for all the [31] record shows now the practice and custom in min-

(Testimony of John Davis Bradley.)

ing in California and Nevada might be entirely different than the practice and customs in Idaho.

Mr. Casterlin: I am leading up to the decision in the Utah Construction Company case where it is held that where there is no uncertainty or ambiguity there is no room for interpretation based on matters outside of the contract, or for importing extraneous matters in aid of interpretation.

The Court: Of course, in passing on these questions, the Court gets involved in the same problems of semantics that the parties themselves do.

Mr. Casterlin: From a semantic standpoint the parties themselves have defined the meaning of the terms in clear language.

The Court: The parties have attempted to define those terms all right, but whether it is clear or not, I don't need to pass on that at the moment.

Mr. Casterlin: That is the reason I wanted to ask this question as to what was the purpose, whether it was applied to the application of the contract as to the operation of the Yellow Pine smelter.

Mr. Ray: To get to the point of this clause in the contract, I would like to show, and I will show, if I am permitted, how it came about, what [32] connection Mr. Bradley had with this and what background he had at the time that he did what he did, and the discussion that he had with the other side about it.

The Court: It seems to me that it would not be relevant to show that he disposed of the product

(Testimony of John Davis Bradley.)

of a mine in three different ways or methods, down in California.

Mr. Ray: But, your Honor, I can't prove the area of the custom of all of those things all at once.

The Court: Then perhaps you should tell us your purpose, do you propose to show that these customs and practices prevailed in Idaho at the time of the formation of this contract?

Mr. Ray: Yes, your Honor.

The Court: Very well, the objection will be overruled.

Mr. Casterlin: Then, your Honor, I think it is incompetent, irrelevant and immaterial to show what the custom was or is in California if the same custom prevailed in the State of Idaho at the Stibnite property.

The Court: Your objection I take it, could, if it was made to the form of the question, the issue here is not what his experience has been, the issue is what is the custom and practice in the mining [33] industry, what was the custom and usage in the industry, even though he may not have participated personally in any of them, I take it that he is an expert on it and he would be competent to testify. So as far as his personal experiences are concerned, if his qualifications are admitted, I will sustain the objection. Are his qualifications admitted?

Mr. Casterlin: Yes sir.

Mr. Ray: With respect to smelting and mining?

(Testimony of John Davis Bradley.)

The Court: I have accepted the statement that his qualifications are admitted entirely. If there are any objections later as to his qualifications in any way we can clear that up later.

Q. Mr. Bradley, between 1933 and 1937 what connection did you have with the Bradley Mining Company and its properties in the Yellow Pine area?      A. Between what date and 1937?

Q. 1933, when you finished your studies at the University of California, and the year 1937?

A. During that period, first, I was during 1935 and 1936, working in the engineering staff at the Bunker Hill and made visitations to the Yellow Pine property, as I would come down through into Oregon to visit the quicksilver property. In 1937, late 1937, I took over the direction and management of that property. [34]

Q. Was the property then managed and operated from 1937 on, under your direct management?

A. Yes, not as a resident manager, but under my control.

Q. It was under your supervision?

A. Yes.

Q. Were you familiar with the ground itself?

A. Yes.

Q. Were you familiar with the engineering studies that were made in connection with it?

A. Yes.

The Court: Are you referring to the mining properties covered by this agreement?

Mr. Ray: Yes, I am, your Honor.



(Testimony of John Davis Bradley.)

The Court: Did you so understand, Mr. Bradley?

A. That he is referring to the Yellow Pine property.

The Court: And by the Yellow Pine property you mean all of the property covered by this contract?

A. Yes.

Q. Now, in 1937 there was no smelter there, was there?      A. No.

Q. And the mining was being carried on under an agreement which had been dated in 1937, was it,—1930, I believe?

A. 1930 is correct. [35]

Q. What was being produced by the mining operation in 1937?

A. Gold antimony concentrates.

Q. Anything else at that time?

A. Not at that time.

Q. From your own examination of the property and a study of the engineering data accumulated at that time, did you expect that there would be yielded from the property values other than antimony and gold?

A. Yes, when the property was acquired in 1927 it was done mainly because of my father's interest in quicksilver and the adjoining property to this so-called Meadow Creek Group was known as the Cinnabar Group, and although during the 1930's the market was very weak, I should say because of the weakness of the market we did not pursue the development of the Cinnabar Group

(Testimony of John Davis Bradley.)

to the extent that we would have liked to have done, but we did recognize the possibilities there.

Q. At that time, was there any prospect of any other metal besides quicksilver, antimony and gold?

Mr. Casterlin: May I inquire now if the witness' testimony is with particular reference to the Hennessey and Meadow Creek Group?

Mr. Ray: Well, let's talk about the property covered by the 1930 agreement.

Mr. Casterlin: Then I think I will object to it as incompetent, irrelevant and immaterial for any [36] purpose as to the issues in this case, which are limited to the Hennessey and Meadow Creek Group.

The Court: Does this comprise more property than is covered by the 1930 contract?

Mr. Ray: I am limiting my question to the property covered by the 1930 agreement.

The Court: And does that include all or only a part of the property covered by Exhibit 7?

Mr. Ray: That includes all of the property covered by Exhibit 7.

Mr. Casterlin: And also other property.

The Court: And other property as well?

Mr. Casterlin: Yes.

The Court: Then your question, your inquiry now, is only as to the property covered by the 1930 agreement as included in Exhibit Number 7?

Mr. Ray: No, at this time it refers to all of the property covered by the 1930 agreement, and shortly I will come to the change from the 1930

(Testimony of John Davis Bradley.)

agreement to the '37 agreement and the '39 agreement, and it is in the '39 agreement that these controversial terms appear.

The Court: It is immaterial here what was expected to be produced from properties that may have been covered in the 1930 agreement that are [37] not involved in the agreement at the bar.

Mr. Ray: I think it is material and relevant, your Honor, for this reason,—when they changed the basis of their agreement from the terms of the 1930 agreement to the 1939 agreement, this provision of net revenue came into being, and at that time that was discussed and the reason for it was discussed between Mr. Bradley and the representatives of the other side,—we are looking for a reason,—under the customs of the smelting business everybody knows why the net smelter return provision is in the contract, but what is the use of this net revenue clause, what is it for?

The Court: Is that a part of the custom of the mining business, to have such a clause, is this net revenue provision a provision known to the mining industry or was it known only to these parties?

Mr. Ray: That is not a provision found customarily in the mining business.

The Court: But is it a term known to the mining industry as distinguished from known only to these parties?

Mr. Ray: That is a term that came in to meet certain purposes and situations as between these parties.

(Testimony of John Davis Bradley.)

The Court: That may have been, but my [38] question still is, was it a term known to the mining industry?

Mr. Ray: No.

The Court: As I understand it, net smelter returns is a terminology known to the mining industry.

Mr. Ray: That's right.

The Court: A phrase of definite connotation.

Mr. Ray: That's right.

The Court: And do you say that the term "mint returns" has the same standing?

Mr. Ray: That's right.

The Court: Does the term "net revenue" have the same connotation?

Mr. Ray: No, it doesn't.

The Court: Or the same standing in the mining industry?

Mr. Ray: It does not.

Mr. Casterlin: May I call attention to the fact that counsel, by this line of questioning, has moved up from the 1930 contract to the 1939 contract, and I want to make further objection to this testimony on the ground that the '39 contract, a portion of which appears on Page 85 of the Transcript, [39] provides as follows: "It is hereby specifically understood and agreed that this instrument of option, contract and agreement rescinds, nullifies, supercedes, and takes the place of all other contracts and agreements of every kind and character between the parties hereto and between the optionor and

(Testimony of John Davis Bradley.)

Fred W. Bradley and The Yellow Pine Mining Company, and that all such prior contracts and all negotiations between the parties hereto relative to the hereinbefore described properties, whether written or oral, of any kind or character, are merged herein, and that this agreement is to be construed without reference to any of said former agreements or negotiations." And in the light of the terms of that 1939 contract I am going to object until they can lay the foundation to show that it is proper to interpret the 1939 contract.

Mr. Ray: I would like to modify one statement which I made,—while the net mint returns and net smelter returns as stated are common, well recognized and universally used language in the mining industry, the mining industry uses other terms, various terms to fit varying situations, to take care of things that don't come either within the net mint or the net smelter returns. We have one of them here. Now, the exact language here doesn't follow any pattern that is recognized, by the same language, while the others are, the other terms are. [40]

The Court: It seems to me that certain customs and practices exist in the district with respect to disposal of products of a mine, and they would be relevant,—what are they, by what different methods were the products disposed of?

Mr. Ray: That is what I am getting at.

The Court: Here is a contract or agreement that the parties were formulating for a millennium



(Testimony of John Davis Bradley.)

or more, for 999 years, undoubtedly they drew from all of the knowledge and experience that they had in attempting to envision what might happen in 999 years in the mining industry. Now, there are various ways of disposing of products of a mine, what were the customs and practices in effect at the time, not what the parties meant by what they wrote in some previous document, but what were the practices and customs at the time this contract was formed, the contract in suit was formed, at that time. I will sustain the objection.

Q. Now, Mr. Bradley, prior to 1937 there was a cyanide plant at the Yellow Pine property, is that right?

A. Yes, but it only operated during 1932, which for a time produced bullion.

Q. Now, what was the custom and practice in the industry by which you got rid of gold bullion?

A. Sold it to the mint.

Mr. Casterlin: We object to that on the ground that it was prior to the 1941 contract, it is too remote, and on the further general ground that net mint returns, there is no argument about that.

The Court: As far as the circumstances surrounding the formation of the contract are concerned I don't suppose that there is any issue, is there?

Mr. Casterlin: No.

The Court: No, any cyanide process which produces gold bullion,—I suppose that has to be sold to the mint, doesn't it?

(Testimony of John Davis Bradley.)

Mr. Casterlin: It has to be sold to the mint.

The Court: Because of the requirement of the law, I think the law provides for that since, when, 1934. Since 1934 under the regulations and the law I suppose that all bullion has to be sold to the mint, making some exceptions, of course, but generally speaking, isn't that true?

Mr. Casterlin: That is correct.

The Court: The objection will be overruled.

Q. What was the practice of the industry with [42] respect to the disposition of antimony and gold concentrates?

The Court: At what time, Mr. Ray?

Q. At this time, prior to the 1939 contract.

A. They were sold to a smelter and we received net smelter returns.

Q. Now, what was the practice with respect to the sale of mercury, for instance?

A. Well, it is normally sold through a broker and you receive returns, usually from the final consumer.

Q. Was the settlement for mercury made as net smelter returns?

A. The theory of net smelter returns would cover, but technically it would be perhaps by a broader coverage.

Q. It never was sold at the smelter, was it?

A. Mercury, as a metal, it was sold to consumers.

Q. So that is a product not sold to smelters?

A. That's right.

(Testimony of John Davis Bradley.)

Q. Mr. Bradley, did you have something to do with the changing of the contract, from the 1930 contract to the 1939 contract?     A. Yes.

Mr. Ray: I should like to offer the 1930 contract, it is marked as Exhibit Number 4 in the Oberbillig Deposition, the Oberbillig affidavit, which is in the record.

The Court: The Affidavit has been [43] filed, has it, and it has not been offered as an Exhibit?

Mr. Ray: It is marked as Exhibit Number 4.

The Court: Is there any objection to this offer?

Mr. Casterlin: We object to the offer of the entire Exhibit on the ground that it is incompetent, irrelevant and immaterial for the following reasons: It purports to be an agreement entered into on the 3rd day of October, 1930, between the United Mercury Mining Company and the Yellow Pine Company, and I object to it on the following grounds, that it has become merged in the 1939 contract, the '39 contract by its specific terms provides that its construction is not to be based upon anything which went before, and on the further ground that the relation between the parties in 1930 was that of lessor and lessee,—the relation between the parties in the contract of 1941 which is under dispute here now, is that of owner and payment of royalties. In other words, the Yellow Pine smelter, and the contract of 1930 was a lessee, and the contract of 1941, it is the owner. The contract of 1930 the United Mercury was the owner and lessor, and in the 1941 contract the United Mercury is the

(Testimony of John Davis Bradley.)

seller and receiving payment of the purchase price, the relation is not the same between the two. [44]

Mr. Ray: Do you object on the ground that Bradley is not a party to it?

Mr. Casterlin: No, Bradley is a party to the '30 agreement.

Mr. Ray: Let me call attention to this, the 1930 agreement, the parties are the United Mercury and the Yellow Pine Companies,—I will ask that question.

Q. Mr. Bradley, in the 1930 agreement, are the parties the United Mercury Company and the Yellow Pine Company? A. Yes.

Q. Who was the Yellow Pine?

A. The Yellow Pine Company in 1930 was owned 50% by my father and a quarter each by two other gentlemen.

Q. And the Bradley Mining Company succeeded to the interests of the Yellow Pine Company?

A. Yes, it took over its interests 100%.

The Court: The objection will be sustained on the ground that the 1930 agreement is irrelevant to any issues here. The Exhibit 4 may remain in the record if you so desire, as a record of excluded evidence. [See pages 253-339.]

Mr. Ray: I would like to include it there because we thought it was material and relevant because of the transition from that into this [45] net revenue and smelter returns as it first appeared in the '39 agreement.

The Court: My present view is that it is relevant

(Testimony of John Davis Bradley.)

and I will sustain the objection on that ground, and I will permit the agreement to remain in the record as I say as a record of excluded evidence, pursuant to the rules. We will take a five minute recess at this time.

March 19, 1957, 11:30 o'clock a.m.

Q. Mr. Bradley, I have handed you Exhibit Number 7, which is the contract of December 31, 1941, and I call your attention to the provision covering net smelter returns, net revenue and net mint returns, are you familiar with those provisions?

A. Yes.

Q. Were they in the previous contract?

A. Yes, they were in the 1939 contract.

Q. Is that the first contract they appeared in, the 1939 contract?

A. Yes, to the best of my memory.

Q. Who negotiated the 1941 contract, Exhibit Number 7, for the Bradley Mining Company?

A. I did.

Q. And who for the plaintiff? [46]

A. Mr. Oberbillig and Worthwine was the attorney.

Q. Mr. Oscar W. Worthwine?

A. Yes, Oscar W. Worthwine.

Q. Who negotiated the 1939 agreement for the Bradley Mining Company?

A. I negotiated it on behalf of the Bradley Mining Company.

Q. And who on behalf of the Plaintiff?



(Testimony of John Davis Bradley.)

A. Mr. Oberbillig and again that was with Mr. Worthwine as attorney.

Q. Did you confer with Mr. Worthwine and discuss the preparation of the 1939 agreement?

A. Yes.

Q. Before it was finally signed?

A. Yes, I did.

Q. Did you, at the time the 1939 agreement was prepared, discuss with Mr. Worthwine the provision which now is referred to as the net revenue provision?

A. Yes.

Mr. Ray: I offer in evidence Contract dated the 16th day of May, 1939, between the United Mercury Mines and the Bradley Mining Company, it has been identified as Defendant's Exhibit Number 5.

Mr. Casterlin: May I ask for what purpose it is introduced? [47]

Mr. Ray: I want to show, and I offer in evidence the conversations and understandings had with the parties with respect to the use and the purposes of the net revenue clause,—and how it got into that contract of 1939 and it is carried over with one slight modification in the 1941 agreement. I offer it upon this ground, your Honor, and we respectively submit that the Court cannot place himself in the situation in which the parties were when they made this agreement unless those vital circumstances are known to the Court.

Mr. Casterlin: We object to the admission of the Exhibit for that purpose, on the ground that it is incompetent, irrelevant and immaterial,—that the

(Testimony of John Davis Bradley.)

relation of the parties were not the same in 1939 as they were in 1941; that any preliminary discussion is presumed to have been merged into the final contract of 1941. In the contract of 1941 the parties, by their own agreement, have defined the meaning of the terms, and having so defined the meaning of the terms themselves it is immaterial what meaning any other person has, or what meaning one person has who was a party to the contract or what meaning another party has unless it is disclosed that there is some ambiguity, some uncertainty in the definition which the parties themselves have placed upon the contract.

The Court: Wouldn't it be a relevant [48] circumstance at the date of execution that there was in effect at the time the agreement was formulated this so-called 1939 contract?

Mr. Casterlin: That is a circumstance.

The Court: In the interpretation of the 1941 agreement?

Mr. Casterlin: Provided that there is some uncertainty, and this witness has not testified and there is no evidence here that there is any uncertainty in the definition of the terms of the 1941 contract, and the parties themselves have defined the meaning of the terms and they are bound by their own definition which they have placed on them.

The Court: The uncertainty may be in the application of something that is defined through a specific situation and the issues tendered here by the plaintiff is such an issue is it **not**?

(Testimony of John Davis Bradley.)

Mr. Casterlin: As to the application of clear, certain and unambiguous terms, the definition, to the operation of the Yellow Pine Smelter.

The Court: Yes, and that calls for an interpretation of the 1941 agreement, does it not, as applied to the Yellow Pine smelter operation?

Mr. Casterlin: To the interpretation of its application, not to the interpretation of the [49] meaning of any of the words.

The Court: Taking that position, assuming that situation, surrounding circumstances aid interpretation, that is, with that assumption it may aid in the interpretation and it may not, they are relevant to the issue as to the interpretation. Now the question immediately at hand is whether or not Exhibit 5 for identification is a material surrounding circumstance. It might aid in the interpretation of the agreement which follows. It seems to me that logically it might, however, it might not be of any substantial assistance, but isn't it relevant to the issue?

Mr. Casterlin: Not to the application to the Yellow Pine unless they can show that the parties were the same and the situation between the parties was the same, and that the same conditions existed there in 1939 as existed in 1941.

The Court: Weren't the parties the same?

Mr. Casterlin: Yes, they were the same.

The Court: So the question here is, is this a relevant circumstance surrounding the 1941 agreement? At the time it was formulated the 1939 one was in

(Testimony of John Davis Bradley.)

existence and was put out of existence by the 1941 [50] agreement.

Mr. Casterlin: Yes, there is no question about that.

The Court: It seems to me then that the objection goes to the weight of it and not as to the admissibility.

Mr. Casterlin: I have stated my objection.

The Court: Yes, and your observation assisted me in my ruling. I will overrule the objection and receive Exhibit Number 5 in evidence.

[See pages 339-371.]

Q. Mr. Bradley, who drafted, who wrote, Exhibit Number 5?

A. This being Exhibit Number 5.

Q. No, you have Exhibit Number 7, Exhibit Number 5 is the 1939 agreement.

A. Mr. Worthwine.

Q. In the course of your negotiations with Mr. Worthwine preliminary to the execution of Exhibit Number 5, did Mr. Worthwine submit to you a preliminary draft of the agreement?     A. Yes.

Mr. Ray: I would like to have this document marked as Exhibit 5 A.

The Court: It may be so marked for identification. [51]

Mr. Casterlin: May I ask the witness a question in aid of objection?

The Court: You may.

Q. (By Mr. Casterlin): Mr. Bradley, are you

(Testimony of John Davis Bradley.)

familiar with what has been marked as Exhibit 5 A?      A. I would like to see it.

(Document handed to witness.)

A. Yes, I am familiar with that.

Q. And is it a fact that it was the worksheet which was used prior to the final draft of the 1939 contract?      A. Yes.

Q. And the 1939 contract then embodies the meeting of the minds after this was discussed?

A. I am not certain that the 1939 contract follows the exact wording of perhaps some of the changes made on here, but the principle was followed, yes.

Q. And the '39 contract became the final contract between the parties after these negotiations?

A. Yes, it became the final contract up to 1941.

Mr. Casterlin: Now, I will object——

The Court: It has not been offered yet, Mr. Casterlin.

Mr. Ray: I had not finished my preliminary questioning quite. [52]

Q. (By Mr. Ray): Mr. Bradley, was Mr. Worthwine a Boise lawyer?      A. Yes.

Q. And long associated with the mining industry?

A. Yes, he was known quite prominently as a mining attorney in the State of Idaho.

Q. And he represented the Plaintiff in the negotiations which resulted in the finalization of Exhibit Number 5?



(Testimony of John Davis Bradley.)

A. Yes, and I think he was in the earlier one of 1937.

The Court: Is he living at this time?

A. Yes.

Q. Did he submit 5 A for your consideration?

A. Yes.

Mr. Ray: We offer Exhibit 5 A, of course, it has to be explained before its significance is apparent.

Mr. Casterlin: I now renew my objection to the offer.

The Court: I don't believe that you stated your objection, Mr. Casterlin, and—just a moment, the witness was volunteering something.

A. I simply want to say in answer to your question, your Honor, that Mr. Worthwine is still living and in active practice.

The Court: I had inquired whether [53] the attorney, Mr. Worthwine, was still living.

Mr. Casterlin: Yes, I see. Now, I will object to the admission of this Exhibit on the ground that it is incompetent, irrelevant and immaterial. By the terms of the Exhibit, the 1939 contract, it is specifically provided that it is to be interpreted without reference to prior negotiations, and on the further ground that it is a paper which was used by Mr. Worthwine in drafting the Exhibit and was not used by this witness, and what ever information he has now, it is indicated, would be peculiarly hearsay on his part.

The Court: The objection is sustained on the ground that Exhibit 5 A is irrelevant.

(Testimony of John Davis Bradley.)

Mr. Ray: May I examine the witness further with respect to some of the features of it, for the record?

The Court: You may make your record of excluded evidence, subject to the objection, pursuant to the Rules. Do you request that it be in your record as a record of excluded evidence?

Mr. Ray: I wanted to make a little further identification of it if I may.

Mr. Casterlin: I think the exhibit has been identified, and offered, and the offer has been denied, and any further questioning respecting the exhibit [54] is not proper.

The Court: You may make your objection and if Counsel desires then, of course, he may make the record.

Mr. Ray: Perhaps it would be better, your Honor, if I make an offer of proof in connection with this. May I do that?

The Court: I think the better practice is to make your record of excluded evidence, and then if the Court of Appeals decides that I am in error it is there for their consideration.

Q. Was Exhibit 5 A submitted to you by Mr. Worthwine as a basis for negotiation of the contract?      A. Yes.

Q. Did it contain any reference to net revenue?

A. As I recall it——

Mr. Casterlin: I think, your Honor——

The Court: Do you object to any further questioning as to Exhibit 5 A?

(Testimony of John Davis Bradley.)

Mr. Casterlin: Yes, and on this question in particular, the Exhibit which has been rejected in the record now, of course, is the best evidence of what it contains.

The Court: The objection is sustained.

Mr. Ray: Then, may I offer to [55] make proof with respect to it, your Honor?

The Court: The document speaks for itself as to what it contains.

Mr. Ray: No, your Honor, it doesn't.

The Court: Then the witness may answer, you may make a record of it as excluded evidence.

Mr. Ray: So that it will not disturb the record, your Honor, may I make a statement off the record?

The Court: No.

Mr. Ray: There is information on this exhibit which I understand——

The Court: You may ask this witness any question you wish, and even though I sustained an objection to it he may answer it and the Answer will stand in the record as a record of excluded evidence under the Rule.

Q. (By Mr. Ray): Is there material on Exhibit 5 in your handwriting?

A. You mean Exhibit 5 A?

Q. 5 A.            A. Yes.

Q. Was that placed on there in your handwriting after and during a discussion of the agreement with Mr. Worthwine?            A. Yes, sir. [56]

(Testimony of John Davis Bradley.)

Q. And does the material that is in your handwriting constitute an amendment of the draft as submitted to you?      A. Yes sir.

Q. And was the material which is on the draft and in your handwriting finally put in Exhibit 5?

A. Yes, the intent, I am not sure that each word follows, but certainly the meaning follows my suggestion there.

Q. Did you and Mr. Worthwine discuss the reasons why you proposed an amendment?

A. Yes sir.

Q. What discussion did you have with Mr. Worthwine with respect to the necessity of an amendment?

Mr. Casterlin: I am going to object to this as incompetent, irrelevant and immaterial for any purpose whatever.

The Court: I assumed that you objected to all of these questions respecting Exhibit 5 A.

Mr. Casterlin: Yes.

The Court: I assume this is offered not for the truth of what it says, or the fact, but to the fact that such words were said, is that correct?

Mr. Ray: I offer this to prove that the net revenue clause, which your Honor has to construe, came into this contract, the 1939 contract, as a result of a discussion between the representatives of the [57] two parties as to why it belonged in there, or why it didn't belong in there, and as to what it was intended to cover when it got in there, and that it

(Testimony of John Davis Bradley.)

was then brought over from the 1939 contract to the 1941 contract.

The Court: Has it been shown that Mr. Worthwine was an agent of the Plaintiff here at that time.

Mr. Ray: There is no doubt about it, as stated in Mr. Oberbillig's deposition, and counsel have never denied that he represented the plaintiff at that time, and he did his negotiating for him.

The Court: The objection is sustained on the ground that all of the objections to Exhibit 5 A are sustained. The witness may answer and his answer may remain in the record of excluded evidence pursuant to the rules. You may answer as to the conversation.

Mr. Casterlin: I might state, your Honor, that I was afraid he might be getting into matters that were beyond the scope of this Exhibit 5 A and that is the reason I made the additional objection.

The Court: Very well, you may answer, Mr. Witness.

A. Knowing that we had other values at the property, that would be perhaps, gold bullion, concentrates, and we had known of quicksilver and at one time we thought that there [58] might be a magnesium mineral that possibly could be recovered. We were hunting for a clause that would cover,—the net mint returns was in there, and we were hunting for a clause that would cover these other possibilities. Mr. Worthwine had one suggestion in there and I changed it with the objective of submitting it to him for his approval and Mr.



(Testimony of John Davis Bradley.)

Oberbillig's approval, a catchall clause that would cover all of these other things that we didn't know just what they might be. We knew of several, that the quicksilver didn't come under the net mint and technically it didn't come under net smelter, so that was the course of the conversation, and from that conversation the net revenue clause was picked up.

Q. Now, Mr. Bradley, is there some of your handwriting in Exhibit 5 A in connection with the net smelter provision?      A. Yes, there is.

Q. And did you write something, as an amendment to that provision as proposed by Mr. Worthwine?

A. Yes, under the definition of net smelter returns I inserted the word normal between 'its' and 'smelting' so that it reads "It being understood that the smelter will deduct its normal smelting charges".

Q. Did you explain to Mr. Worthwine why that was desirable?

A. Yes, we discussed that point.

Q. What did you tell him? [59]

A. Well, I felt that on two counts,—one, that we had had difficulty with Mr. Oberbillig in the prior contract; that we wanted to catalog smelting charges as being customary, normal type of smelting charges. In the instance, number one, of our doing our own smelting, number two, as a protective device so that we could not overcharge Oberbillig. In my mind it was the customary way of cataloging smelting charges although the contracts that I am

(Testimony of John Davis Bradley.)

now familiar with do it with more language, they don't do it by defining it by the word 'normal'.

Q. That was a limitation then that you might assess in the event that you smelted your own ore?

A. Yes, and also a qualifying factor should we be shipping to some other smelter where Mr. Oberbillig might think the charges were too high, they were cataloged as normal, it was a protective, qualifying device.

Mr. Ray: In view of the witness' testimony, we take the liberty of re-offering Exhibit 5 A.

Mr. Casterlin: And we renew the same objection.

The Court: The objection is sustained. This concludes the testimony with respect to Exhibit 5 A, and the record will show that all of the testimony from the time it was first offered, which offer [60] was objected to and the objection sustained and offer rejected, all of your testimony subsequent to that portion of the record and up to this juncture constitutes a record of excluded evidence pursuant to the Rules.

Q. Now, Mr. Bradley, will you again refer to the provisions in Exhibit Number 7 for "net revenue". You will observe that it says "By net revenue as used herein is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties", does that clause "produced from said properties" have any accepted meaning in the min-

(Testimony of John Davis Bradley.)

ing industry according to the mining industry's customs and practices?

A. Yes, in my mind it does.

Mr. Casterlin: We object to this on the ground that it is incompetent, irrelevant and immaterial. The question of custom is not in issue in this case, and furthermore, it is not shown that there is any ambiguity in the terms or that there was any misunderstanding between the parties as to the meaning of the terms.

The Court: Is it proposed to be shown that the phrase "from said properties", that the term has a peculiar connotation in the mining industry different from its normal everyday meaning. I presume that it would mean that,—"from the property". If it means something else, you may show that. I take it that the parties may, if [61] a contract says black, the parties may show that in a particular industry black means white and that it was used in that sense.

Mr. Ray: It doesn't go that far, your Honor.

The Court: It is only when there is an issue as to whether or not the words mean something other than their normal signification.

Mr. Ray: Maybe I better ask a few preliminary questions.

The Court: It is after twelve now, and we will take the noon recess until two o'clock.

March 19, 1957, 2:00 o'clock p.m.

Mr. Ray: I would like to clear up a matter that may have caused some confusion.

(Testimony of John Davis Bradley.)

The Court: You may proceed, Mr. Ray.

Mr. Ray: This morning we started out to make proof of Mr. Bradley's qualifications to testify with respect to the custom and practice in the mining industry. I thought that our friends on the other side stipulated that Mr. Bradley was qualified to testify as to the mining custom and practice in general, as they relate to Idaho and the other western states. Now, if that is the [62] purport of Mr. Casterlin's stipulation I am content, but if there was a limitation to the state of California in his stipulation then I would have to pursue the matter farther.

Mr. Casterlin: I do not doubt the witness' qualification to testify as to the custom in the state of California, but I do question the materiality and the relevancy of the customs which existed in the state of California with respect to the issues in this case.

Mr. Ray: We understand, Mr. Casterlin, that you have reserved an objection to the materiality of all of this evidence. Do you agree that Mr. Bradley is qualified to testify with respect to the mining customs and practices as they relate to the State of Idaho,—smelting and mining?

Mr. Casterlin: Yes, we admit his qualifications to testify to those, reserving to ourselves the right to object on the ground of relevancy and materiality and so forth as to the time and the general location and things of that kind. We do not ques-

(Testimony of John Davis Bradley.)

tion his qualifications,—we question the relevancy of his testimony.

Mr. Ray: Then, your Honor, I would like to withdraw the last question and start a little farther back.

Q. Mr. Bradley, were you familiar with the custom of the [63] mining and smelting industry in the State of Idaho in 1939 and 1941? A. Yes.

Q. Did the industry, the mining industry, in that area recognize a distinction between mining and smelting?

A. Yes sir, I think in any area that is recognized.

Q. What was that?

A. In any area, any western area—or eastern—that is recognized.

Q. There is a distinction?

A. There is a distinction and has been a distinction.

Q. What is that distinction?

A. The distinction being that mining as such is merely the extraction of ores from the grounds and perhaps concentrations of them. Mining and concentration generally being considered in one general category. Whereas, smelting is the reduction of ores or concentrates to its metallic form.

Q. Aside from the custom and practice in the mining industry are there any laws or regulations which require a separation for accounting purposes of those two processes?

A. Yes sir, very definitely.



(Testimony of John Davis Bradley.)

Mr. Casterlin: Now, Mr. Bradley, before you go any further I think you have answered the question.

Q. What requirements are there?

Mr. Casterlin: We object to that as [64] incompetent, irrelevant and immaterial and it doesn't tend to prove or disprove any of the issues in this case.

The Court: You mean as to the law.

Mr. Ray: The requirements of the industry itself or the law.

The Court: Well, as far as the law is concerned the Court will take judicial notice of that.

Q. In the mining industry do you——

Mr. Casterlin: I have an objection, may I have a ruling?

The Court: I understand the question is being withdrawn.

Q. In accordance with the practice and custom of the industry do you keep the operations of the two separately?

A. For accounting purposes, yes.

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial, and not limited to the area in which the Hennessey the Meadow Creek groups are located.

The Court: Sustained in that form.

Q. Where is Bunker Hill?

A. Kellogg, Idaho.

Q. How far away is that from these mining properties?

(Testimony of John Davis Bradley.)

A. Approximately three hundred miles.

Q. What is the nature of the Bunker Hill operation?      A. Mining and smelting. [65]

Q. On a large or small scale?

A. Large scale.

Q. What products do they mine and smelt?

A. They mine lead, silver and zinc ores and smelt—

Q. Are those ores produced by the Bunker Hill Company?

A. By the Bunker Hill and by others and by properties 100% owned, 50% owned and on a lease and option basis.

Q. So that it is a custom smelter?

A. It is.

Q. In one part of its business and in the other part it smelts ore produced from its own properties?

A. Approximately 50% from its own properties and 50% from the outside, including Australia and South America.

Q. And it also treats ores arising from grounds which the company leases from others?

A. That is correct.

Q. Now, did they follow the customs and practices of the mining industry generally?

Mr. Casterlin: I want to object to that question on the ground that it calls for a conclusion on the part of the witness.

Mr. Ray: I thought you just stipulated that he was an expert on the subject.

(Testimony of John Davis Bradley.)

Mr. Casterlin: I did.

The Court: The objection is sustained. [66]

Q. Is there any difference in the practice and custom of the mining industry in one part of Idaho and the other?

A. No, in a general way, no.

Q. Now, is it the custom and practice in that area for separate records to be kept as to the production of the mine as distinguished from the production of the smelter?      A. Yes.

Q. Was that so in 1939?      A. Yes.

Q. Mr. Bradley, I think you stated this morning that you negotiated on behalf of the defendant, the contract of December 31, 1941?

A. Yes.

Q. That is Exhibit 7?      A. Yes.

Q. On the other side Mr. Worthwine and Mr. Oberbillig represented the Plaintiff?

A. That is correct.

Q. When did these negotiations open, if you know?

A. Approximately in the spring of '41, but I am not positive as to the exact time.

Q. Did those negotiations continue during the months up until the contract was finally signed?

A. Yes.

Q. Did you discuss the matter both with Mr. Worthwine and [67] Mr. Oberbillig?      A. Yes.

Q. Did you state to them your reasons for desiring a change?      A. Yes.

Q. What were those reasons?

(Testimony of John Davis Bradley.)

Mr. Casterlin: Now, we object to this on the ground that it is incompetent, irrelevant and immaterial for any purpose in this action, and is an attempt to vary the plain, simple and unambiguous terms of a contract and the preliminary negotiations were all merged into the ultimate contract.

The Court: The objection is sustained on the latter ground, the last ground stated.

(Remarks by Mr. Breshears and the Court, reported and not transcribed.)

The Court: The objection will be sustained as stated and you may make your record of excluded evidence, if you desire, pursuant to Rule 43B.

Mr. Breshears: Thank you, your Honor, for your patience.

Q. Mr. Bradley, prior to the year 1941 was there any discussion with the Plaintiff in this case or any of its officers with respect to the possible construction of a smelter at or near the site of the property covered by the agreement? [68]

A. Yes, many times.

Q. When were those first discussions?

A. As far as I was concerned, probably in the late thirties, and so far as others representing my company were concerned, earlier than that.

Q. With whom were those discussions?

The Court: Is this all under your excluded evidence rule?—You don't care to make a record of the other matter?

Mr. Ray: I think maybe we should if we are permitted to do so.

(Testimony of John Davis Bradley.)

The Court: Yes, you may, absolutely.

Mr. Casterlin: Then I understand these questions are under the excluded evidence rule as announced by the Court.

The Court: Yes, there was a question pending to which the Court sustained an objection, do you wish it read?

Mr. Ray: Yes, please.

(Question read by reporter as follows:

“What were those reasons?”)

Mr. Casterlin: That was the question to which there was an objection directed.

The Court: And sustained, and the evidence excluded. [69]

Mr. Casterlin: I would like to be advised by counsel when he terminates his examination on this point.

The Court: Do you understand the question?

A. No, I am a bit lost, what were those reasons, —I don't remember just before that.

Q. You stated that negotiations for the 1941 contract began sometime early in the year and that you discussed the matter with the representatives of the plaintiff, and I asked you then if you stated the reasons why you wanted the contract changed, and you said “Yes,” now, what were those reasons?

A. The reasons were that the '39 contract, in our minds, was going to become burdensome owing to the royalty, the graduated royalty schedule contained in it.

Q. The royalties were too high?



(Testimony of John Davis Bradley.)

A. The royalties were higher than we thought we could economically bear. In other words, ore that would be ore under a certain royalty would not be at the higher rate of royalty.

Q. Would that then, in effect, place a limitation on the mine?      A. Yes, sir, oh yes.

Q. Now, coming to another subject, Mr. Bradley—

The Court: —Was this told to the Plaintiffs?

A. Yes, as the reason, our reason for wishing it.

The Court: I will reverse the ruling on that, I think that should stand,—that answer, as the reason why the contract, why the 1939 contract was terminated and the new contract was negotiated. It being a motive or purpose expressed to the other party, that, in my opinion, would be admissible.

Q. Now, Mr. Bradley—

The Court: —So that the last answer will stay in the record,—I want the record to be perfectly clear on that.

Q. You state that in the late thirties you began discussion with the other side with respect to the possible construction of a smelter at the site, is that correct?

A. I didn't begin serious discussion with them pertaining to the point, no. I mentioned to them that we were carrying on research toward the best method of local reduction and would report periodically as to our progress.

Q. Did those studies continue?

A. Yes, they continued.

(Testimony of John Davis Bradley.)

Q. Over what period of time?

A. Starting in the early thirties every bit of work was a step ahead in the next phase and the latest work was what was being undertaken, was being done on our behalf by the research laboratory up at Kellogg, by the Bunker Hill [71] Company, and that was done to the best of my recollection in the late thirties and up until about war time.

Q. Until about the war time?

A. About 1941, and then it was picked up again around about 1944 or '45.

The Court: So that the record will be absolutely clear here, gentlemen, I mean, it is clear to me but I don't know whether the record is clear for a rehearing, and I don't know whether it is clear to you. I reversed that ruling so that there is no record of any evidence excluded and so that none has been excluded since the morning session.

Q. Was that during the years from time to time discussed with either Mr. Worthwine or Mr. Oberbillig?      A. Yes.

Mr. Ray: Might I remind your Honor that Mr. Worthwine was a beneficiary under the 1941 contract.

Q. After the 1939 contract was signed, and before the 1941 contract was signed, was there any discovery on this property covered by this litigation, of any product which could be mined and which could be mined and which would not or could not be sold to a smelter?      A. Yes, sir.

(Testimony of John Davis Bradley.)

Q. What product was discovered on the property? [72]      A. Tungsten.

Q. When did you discover the existence of tungsten in the property?

A. We were made aware of it by a telegram from the United States Geological Survey in early February of '41. I should add to that, Mr. Ray, that we also were conscious of mercury being on the Cinnabar deposit and at any time might be discovered on the main Meadow Creek and Hennessey property.

Q. In connection with that mercury, I don't know whether I asked you before, but so that I will be sure and have it in the record,—does mercury occur sometime in the earth in a metallic form or free mercury?      A. Yes, it does.

Q. And if you get free mercury in the earth, after you extract it, what do you do with it,—I will put it this way, do you send it to a smelter?

A. No, after you mine your cinnabar which is the most common occurrence of mercury, you roast it and condense the fumes and recover the finished product.

The Court: Where is that done, Mr. Bradley?

A. That is normally done right at the property, regardless of size, it can be a very small deposit, in which case they merely retort it.

The Court: Why is it done on the [73] property, is there any particular reason?

A. Normally you wouldn't want to haul that

(Testimony of John Davis Bradley.)

low grade material,—the low grade bulky material, and you concentrate it by this process.

Mr. Casterlin: I wonder if the witness would speak a little louder, I don't hear him.

A. You wouldn't want to haul the low grade bulky material owing to the economics, and it is so cheap to reduce it right on the spot.

The Court: Then, as I understand it, with respect to the so-called cinnabar, mercury bearing ore, it was, at the time the contract was formed, the custom and practice in the mining industry to roast the ore at the sight of the mine and get the mercury out of it there and sell the mercury, the finished product, because it was not economical *the* transport the ore itself some distance.

A. The answer is yes.

Q. Mr. Bradley, according to the custom and practice in mining country, is that treatment which relates peculiarly to mercury regarded as mining or smelting?

A. It is regarded as mining.

Q. When did you start, if you did start, mining tungsten?

A. In the late summer of '41 and started up the concentrator, as I recall it, in August and made our first shipment late [74] that month,—in August of 1941.

The Court: Will you tell us at this point, you have been discussing the practice of the mining industry in Idaho at this time, in 1941, what was

(Testimony of John Davis Bradley.)

the practice with respect to the production of that tungsten, can you tell us?

A. Yes, tungsten occurred as about one and a half per cent grade of the radical W03, tungstic oxide, the mineral being scheelite, calcium tungstate, CaW04.

The Court: And that was a deposit you found on this property? A. Yes.

The Court: And what was the custom and practice at that time with respect to handling and processing this scheelite?

A. In order to market that ore it had to be concentrated to at least sixty per cent.

The Court: And how was that done?

A. That was done by a combination of flotation and gravity concentration method.

The Court: And where was that done?

A. That was done at the property.

Q. And why was it done at the property, rather than at some other place? [75]

A. Again because of economics and the freight being such a factor, it was so much cheaper to do it on the spot rather than haul it eighty miles and bear a freight cost against the low grade ore.

The Court: Eighty miles being the distance from where to where?

A. From this property to the railroad at Cascade, Idaho.

The Court: You have described what you consider good business mining practice at this point at that time, and my question deals with what was



(Testimony of John Davis Bradley.)

the custom and practice in the industry with respect to that type of ore in that community at that time, not what you did in this case but what was the general practice and custom in handling the ore?

A. It was exactly the same.

The Court: As you have described?

A. Yes.

The Court: And for the same reason?

A. That is correct.

Q. Now, Mr. Bradley, you have described to His Honor how that material was handled, will you state whether or not, in accordance with the custom and practice, was that regarded as **mining or** smelting?      A. Mining.

Q. Is it a fact or isn't it that what you did to that was [76] milling, in the sense that milling is a term understood by the mining industry?

A. I call it concentration.

Q. Is it milling?      A. Yes.

The Court: Do you call mercury ores, cinnabar ores, do you call that quicksilver?

A. Yes, they are referred to as quicksilver.

Q. Were any of those antimony concentrates or tungsten concentrates which you mined in the fall and summer of 1941, disposed of by you?

A. You say were the concentrates, the **tungsten** concentrates, disposed of by us?

Q. Did you dispose of the tungsten concentrates in 1941?

A. Yes, we commenced shipment in either late August or early September of 1941.

(Testimony of John Davis Bradley.)

Q. Were they sent to smelters? A. No.

Q. Or mints? A. No.

The Court: Now, what was the custom and practice of the mining industry in that community at that time in disposing of that tungsten?

A. Your market was entirely in the eastern United States, and with a very few limited consumers. In our particular case—— [77]

The Court: ——Was it to sell them somewhere else? A. Yes.

The Court: Ship them somewhere and sell them, was that it?

A. Yes, practically every consumer was east of Chicago.

The Court: Then, as I understand it, the custom and practice at that time, in 1941, in that community, was to mine this tungsten ore and put it through this flotation process which you described, and concentrate its value, and then ship the concentrate somewhere east of Chicago to a market.

A. That is correct.

Q. And was that practice which you followed in accordance with the general practice in the mining industry? A. Yes.

Mr. Casterlin: I am going to object to that because it is in conflict with the answer he has just given, it is immaterial if it has relation to any area outside of the area of these particular claims.

The Court: As I understand it, it was a repetition of the question that I just asked.

(Testimony of John Davis Bradley.)

Mr. Casterlin: Then if it is I have no objection.

Mr. Ray: I just wanted to make [78] sure of it.

The Court: Are you referring to this locality in northern Idaho?

Mr. Ray: That is the way they did it in Northern Idaho, but I wanted to know whether that practice in Northern Idaho was in accordance with the general practice in the industry, I thought you asked that question but I wanted to be clear on it, I wasn't sure.

The Court: I didn't ask with respect to if it was the custom anywhere else, if the question refers to the custom in any other community then, of course, that might be objectionable.

Mr. Casterlin: That is the question as I understood it and to which I made my objection, as being immaterial.

The Court: Suppose the custom was different in Nevada or down in California, would it be material here? What we are interested in was the custom here. Of course, the practice,—well, it might be material if it was shown that it was a widespread custom.

Mr. Casterlin: But custom is not in issue here.

The Court: We are receiving evidence of custom and practice as one of the surrounding [79] circumstances. The question is, is it the custom and practice in the entire mining industry, or is it the custom and practice merely in this community at this particular time?

(Testimony of John Davis Bradley.)

Mr. Ray: I want to make one point clear here if I may. Some people think that Stibnite, the community mentioned here, is in Northern Idaho, and some think it is in Central Idaho, but I take it that your Honor doesn't make any point by the use of the words "North Idaho."

The Court: Perhaps I should not have said north. I mean where this property is. I am talking about the time this contract was negotiated and formed, and I am talking about that particular territory. If you want to show that this custom not only prevails in that community but was the custom throughout the mining industry, I will permit you to do so. You may also show, if you so desire, that it was not only the custom at that time but was the custom from time immemorial, if that happened, I don't know. The reason I would allow it is that it seems to me that it would be material in interpreting a contract that the parties intended to run for nearly a thousand years.

Q. Can you state how wide that custom and practice was at that time? [80]

A. In the case of tungsten?

Q. Yes.

A. Tungsten had to be concentrated in order to be shipped to eastern markets unless it was sufficiently high grade to be shipped as ore.

Q. And was the practice that you followed up there in accord with the general practice throughout the mining area?

A. Yes, with the exception that we had to float

(Testimony of John Davis Bradley.)

our sulfides out first, we had a more complicated situation, but, in general, we followed the normal practice.

Q. Did you ship substantial quantities of that during the fall of 1941?     A. Yes.

Q. Did that become an important part of your mining operations in the years beginning with the year 1942?

A. It became the most important part in the history of the mine from beginning to end.

Q. For how long a time did you continue to mine tungsten?

A. Through '44 and into part of '45 as I recall.

Q. State whether you continued all through those years to treat the material and send it to purchasers other than smelters?     A. Yes.

Q. Did you at any time after December 31, 1941, subject any of your tungsten concentrates to any process which [81] was outside the realm of mining before you disposed of it?     A. Yes.

Q. Where was that done?     A. In Boise.

Q. In this city?     A. In Boise, Idaho.

Q. What did you do with the tungsten ore at the mine before the product was shipped to Boise?

A. Concentrated them.

Mr. Casterlin: May I ask what year that was?

Q. When did you begin that?

A. I believe that was in late '43, it may have been early '44.

Mr. Casterlin: We object to this on the ground



(Testimony of John Davis Bradley.)

that it does not aid in anyway in determining the contract prior to the time it was drawn.

The Court: Is the purpose of this to show an interpretation placed by the parties, upon the contract, subsequent to its execution? It would be relevant to that, would it not?

Mr. Casterlin: Yes, but I want to find out the purpose.

The Court: Before you leave the question of the custom and the practice existing at the [82] time the contract was formed, was there in the history of tungsten mining or in the mining of tungsten ore, did you ever know of any custom or practice to send the ore to a smelter? A. No.

The Court: In the history of mining quicksilver ore, did you ever hear of any custom or practice of sending any of that ore to a smelter?

A. Yes.

The Court: Your answer is yes?

A. I don't think it applies here, but in case of a quicksilver antimony ore from Mexico, it did go to a smelter, but it is an odd case.

The Court: Is that an isolated instance?

A. An isolated instance, yes.

The Court: In all of your knowledge of the mining history, did you ever know of any other instance of quicksilver ore being sent to a smelter?

A. Not a smelter as we know it.

The Court: What do you mean by "smelter as we know it?"

A. What we are talking about in this instance

(Testimony of John Davis Bradley.)

here, as a smelter, is one that will reduce metals such as lead, [83] copper or zinc to their metallic form,—lead, copper, zinc or antimony. In the case of mercury it does have a heat treatment.

The Court: That is called a roasting treatment?

A. Roasting, but even roasting is a form of smelting, but nevertheless the Internal Revenue didn't catalog it as a part of the smelting process because it's so simple.

The Court: Did the term "smelting," in the mining industry, at this time did it have, and has it always had, some special signification?

A. Yes, you don't speak of quicksilver as being smelted.

The Court: What is the content of the process referred to as smelting?

A. In simple form it is roasting away the sulphur, reducing then the oxidized mineral to metal and refining the impurities away.

The Court: Are there separate steps,—three steps?

A. Roasting, reduction and refining.

The Court: Three essential steps of smelting?

A. Yes.

The Court: Has that always been so? [84]

A. Yes. May I add, your Honor, in the case of tungsten, so that we are absolutely clear,—tungsten, being an oxide, goes through a heat process to be reduced to a metal, but that isn't called,—we don't think of it as smelting.

(Testimony of John Davis Bradley.)

The Court: Where does that take place customarily?

A. Customarily on the eastern seaboard.

The Court: The purchaser of the concentrates does that? A. Yes, that's correct.

Q. (By Mr. Ray): You were just about to tell us about this Boise plant, what did you call that?

A. We called it the Boise purification plant.

Q. To what treatment were the concentrates mined subjected to in the Boise purification plant?

A. Phosphorus, arsenic, antimony and sulphur were all removed.

Q. By heat?

A. By heat and leaching. We remove the phosphorus by leaching with hydrochloric acid, remove the antimony by leaching with caustic soda and we roasted off the remaining antimony, some arsenic and some sulphur, by heat.

Q. Was that a part of that treatment outside of what the mining [85] industry recognizes as mining?

A. Yes, I would call the roasting step there beyond—at a higher temperature than we would use in mercury and therefore over into the smelting phase. Furthermore, the change in the nature of the material by the removal of lime and the removal of these other impurities goes beyond a normal ore dressing.

Q. Now, was the product which resulted from the Boise treatment sold to customers in the east?

A. Yes.

(Testimony of John Davis Bradley.)

Q. Did you compute royalties on the proceeds of those sales?     A. Yes.

Q. Did you periodically report to the Plaintiff the proceeds and show how the royalties were computed?     A. Yes, monthly.

Q. And did you deduct from the amount received for those products the cost of the Boise treatment?     A. Yes.

Mr. Casterlin: May I suggest here to counsel, if you have a sheet illustrative of the report then I won't have to object that the report is the best evidence.

Mr. Ray: I was going to offer some of those by another witness, but I don't object to producing one at this point. [86]

The Court: Introduced just as an exemplar——

Mr. Casterlin: Oh, yes.

The Court: This will be Exhibit 29 in this case.

[See page 417.]

Q. Will you examine the document which has been marked as Exhibit 29, Mr. Bradley, and explain to His Honor what that is

A. This is evidence of a shipment from our Boise purification plant to Sylvania Electric Products Company. It shows the gross sales per the attached invoice which is the actual invoice to Sylvania less the operating costs——

The Court: ——The gross sales of what?

A. Shipment of tungsten which had been processed at the Boise purification plant, less the op-

(Testimony of John Davis Bradley.)

erating costs at the Boise purification plant, including depreciation.

Q. May I ask you one or two questions for the purpose of clarification. Does this—withdraw that—this indicates that it is an invoice, this first page, is that right?

A. I don't know which is your first page, but the big sheet is mine.

Q. The long sheet? [87]

A. The long sheet is the invoice, yes.

Q. And it is identified as B-13-B? A. Yes.

Q. This is an invoice covering a lot number?

A. Correct.

Q. It indicates a sale of products to the Sylvania Electric Products Company of Towanda, Pennsylvania? A. Yes.

Q. And the product covered by this invoice was material shipped out of the Boise purification plant, is that right? A. Yes.

Q. There is a figure near the bottom of the page,—\$34,228.93, is that correct?

A. That is correct.

Q. Is that the amount paid to the Bradley Mining Company by the Sylvania Electric Products Company, Incorporated? A. Yes.

Q. What is the short sheet?

A. The short sheet was our evidence to the United Mercury Mines Company of this shipment, of the receipt and less our charges for processing that material.

Q. Now, was the invoice, in this particular case,



(Testimony of John Davis Bradley.)

B-13-B, and the report showing the receipts from Sylvania less deductions sent to the Plaintiff? [88]

A. Yes.

Mr. Ray: We offer Exhibit 29 in evidence.

The Court: In other words, copy of this invoice plus what you call the report, those two together was the accounting,—constitute the accounting made to the Plaintiff, of this particular transaction?

A. Yes, sir.

The Court: And was a like accounting made over a period of years for like shipments?

A. Yes, sir, be it a smelter or be it any other consumer, it would be the net smelter return or the invoice.

The Court: Is there any objection to this offer?

Mr. Ray: I might say, your Honor, these are copies, but the other side, presumably, has the originals.

Mr. Casterlin: May I ask a question in aid of an objection?

The Court: You may.

Q. (By Mr. Casterlin): Mr. Bradley, you testified to the Exhibit 29 and you called attention on the short sheet to an item less operating cost applicable, including depreciation. You mailed these to the United, did you? [89]

A. Yes.

Q. You mailed them a check?                      A. Yes.

Q. Was there ever any objection to that item?

A. No, none.

Q. You know of no objection?

(Testimony of John Davis Bradley.)

A. No, I don't.

Mr. Casterlin: No objection.

The Court: Exhibit 29 may be received. The amount shown, for Exhibit 29, from Sylvania. From that you deducted the actual cost of this operation at the purification plant, is that it?

A. Plus the depreciation,—including the depreciation, which is a part of the cost.

The Court: A part of the cost? A. Yes.

The Court: In other words, you did it without a profit? A. That's right.

The Court: At the estimated cost for the processing? A. Yes.

Q. (By Mr. Ray): Mr. Bradley, you testified that other reports and invoices similar to Exhibit 29 were sent monthly during all the time you operated the Boise purification plant. [90] As near as your recollection serves, can you tell us when that began and how long it persisted?

A. I believe it began in 1943 and persisted into '45, but I would have to double check to be absolutely positive about that,—1943 into 1945.

Q. Now did anybody representing the Plaintiff, United Mercury, ever complain or object to that method of settlement? A. No.

Q. Did Mr. Worthwine ever complain or object about that settlement? A. No.

Q. When you began—

The Court: Before you leave that,—over what period of time did this manner of handling tungsten through the Boise purification plant take place?

(Testimony of John Davis Bradley.)

A. I think it was close to two and a half years.

The Court: And over that period of time how often did you make accounting to the Plaintiff, similar to Exhibit 29?

A. We made monthly accounting and normally there would have been shipments out of there every month. There should have been an accounting almost every month,—an accounting of receipts. [91]

The Court: During the entire period?

A. Yes—I wouldn't say every month, but every month there was a shipment there would have been an accounting.

Q. Mr. Bradley, when you began production of tungsten concentrates in an important way, did you discontinue the production of other ores and concentrates?

A. No, on the contrary. Once we got into the tungsten the other minerals increased, like antimony, so that we had a greater production of antimony.

Q. Was that because the antimony resulted as a by-product of the tungsten?

A. Yes, the antimony didn't hold the value that the tungsten did.

Q. How did you dispose of the other products?

A. We shipped them wherever and whenever we could, and finally made fairly steady arrangements with the Harshaw Chemical Company of El Segundo, California, for the shipment of antimony concentrates.

(Testimony of John Davis Bradley.)

Q. Did they operate a smelter there for the treatment of antimony concentrates?

A. They happened to have an inadequate plant for the receipt of our concentrates and spurred by the Government they built a completely new plant there under D.P.C. for the receipt of these concentrates. [92]

Q. Was that a smelter?

A. That was a smelter.

Q. Did you from time to time following January 1, 1942, ship antimony concentrates to Harshaw Company at El Segundo?

A. To Harshaw Chemical and numerous others about the country, including the Laredo Smelter, at Laredo, Texas, the Chemical and Pigment at Baltimore, to the Federated Division at A. S. and R. at Whiting, Indiana.

The Court: What is A. S. and R.?

A. American Smelting and Refining.

The Court: And what is D.P.C.?

A. Defense Plant Cooperation.

Q. So that you had more than one outlet during those years for this antimony concentrate?

A. Yes, during the wartime there was a demand for antimony in addition to tungsten.

Q. And are we correct in understanding then, Mr. Bradley, that these antimony concentrates were shipped to smelters?

A. Yes, with the exception, Mr. Ray, of one or two instances where it was used as a precipitant in a process,—that was a wet process. I just don't

(Testimony of John Davis Bradley.)

want to say that it all went to smelters because it didn't. There were one or two instances where it didn't. [93]

Q. Some of the antimony concentrates were disposed of to purchasers other than smelters?

A. Yes.

Q. Did you continue to produce gold concentrates?      A. Yes.

Q. When you speak of gold concentrates is that a concentrate which is particularly valuable for its gold content?

A. Yes, gold being the most valuable.

Q. Was there, in the gold concentrates, some antimony?      A. Yes.

Q. You have spoken of antimony concentrates, are we to assume that when you refer to antimony concentrates you are referring to a concentrate or product which is particularly valuable in antimony?

A. That is correct.

Q. Did the antimony concentrates contain some gold?      A. Yes, sir.

Q. Where did you dispose of your gold concentrates?

A. Mainly to the American Smelting and Refining Company's plants at Garfield near Salt Lake City and at Tacoma, Washington.

Q. How were you paid for those products?

A. On the basis of net smelter returns.

Q. What does the term "net smelter returns,"—what is it understood to mean in the mining industry? [94]



(Testimony of John Davis Bradley.)

Mr. Casterlin: I think it is stipulated in the Pre-Trial Order about the net smelter returns.

The Court: Is it covered by the Pre-Trial Conference Order?

Mr. Casterlin: Yes, your Honor.

Mr. Ray: We would like to have the Pre-Trial Order considered as a part of the record by the Court, and we offer it in evidence as such.

The Court: Is there any objection to that?

Mr. Casterlin: No objection.

The Court: It may be admitted and received as Exhibit Number 30. Now, Gentlemen, if this is covered by the agreement we don't need to take the time here on it.

[See page 419.]

Mr. Casterlin: It is covered by the definition which the parties accepted for themselves and put into the contract of 1941.

The Court: Where is it referred to in the Pre-Trial Conference Order? I understood you to say that it was in the Pre-Trial Conference Order, that's what we are interested in right now. The term is used in Paragraph K at the bottom of Page 5 of the Pre-Trial Order. Perhaps we can cover it with a question or two rather than look for it. Mr. Bradley, does the term, or did the term, [95] "net smelter returns" have any special signification in the mining industry at the time the 1941 contract was negotiated and formed?

A. Yes, your Honor, it——

Mr. Casterlin: ——May I interpose the objection

(Testimony of John Davis Bradley.)

that the term "net smelter return" has been defined by the parties themselves in plain, simple and clear language as found in the Exhibit which has been admitted as the contract of December 31, 1941, the language which appears on Page 17.

The Court: Will you read that to me?

Mr. Casterlin: "By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

The Court: The objection is sustained.

Q. Mr. Bradley, when concentrates are sold to a smelter does title pass to the purchasing smelter?

Mr. Casterlin: I think that is answered by the answer to our interrogatories. [96]

A. —May I ask whether you mean as a general practice?

The Court: You don't need to pursue that right now, we will take our afternoon recess at this time.

March 19, 1957, 3:25 O'Clock P.M.

Q. Mr. Bradley, I think that you stated that you are familiar with the custom and practice under which concentrates are sold to custom smelters, is that right?      A. Yes.

Q. Was Harshaw a custom smelter according to your understanding?      A. Yes.

Q. And Bunker Hill, your own smelter, is a cus-

(Testimony of John Davis Bradley.)

tom smelter?           A. Yes.

Q. Were National Lead and Laredo custom smelters?           A. Yes.

Q. Is it customary in the industry when concentrates are sold to a custom smelter, to provide for the deduction of normal smelting charges?

Mr. Casterlin: I think that is covered by stipulation and deposition.

Mr. Ray: I am referring to the word "normal."

Mr. Casterlin: I think we have defined [97] the word "normal" when we have agreed on the net smelter returns, and we have in here an exemplar.

The Court: Isn't it the gross less the reasonable and necessary cost of smelting?

Mr. Casterlin: Yes, as I say, we have an exemplar here and we have submitted reports, they are Exhibit 3, which are attached to the Complaint.

Mr. Ray: My point was that when you deal with an outside smelter, or when you sell to an outside smelter, you don't have anything to do with what the man you are dealing with is going to deduct, he either buys your product or he doesn't, but you have the word "normal" or its equivalent in the mining industry when the ore is treated by the smelter, and only then. Normal means nothing in connection with the sale of concentrates to a custom smelter, it has a meaning in the industry only when the smelting company is also mining.

The Court: Wouldn't it have its ordinary signification, what is usual, a normal charge is what is usually charged.

(Testimony of John Davis Bradley.)

Mr. Ray: There is no such thing as usual in connection with the sale of concentrates to a custom smelter. There may be treatment charges.

The Court: Isn't there such a [98] thing as something usual in connection with the charge that the smelter makes?

Mr. Ray: That is what I want to ask this witness about.

The Court: I understand there is no issue between the parties on that.

Mr. Casterlin: There is no issue and I will make the further objection on the ground that the parties have defined what they mean by "net smelter returns."

The Court: This deals only with "normal" as it is in the definition.

Mr. Ray: It says, under net smelter returns, that the smelter will deduct its normal smelting charges, they shall be allowed to deduct the normal smelting charges.

The Court: To me that means that the smelter may deduct what is ordinarily charged for those services.

A. When we sell to someone outside we have no control over what he deducts, we do if we smelt it. Now, in the Boise purification plant if we undertook to charge excessively, he could complain, he could say, no, you are charging too much.

The Court: That would be abnormal, wouldn't it? [99]

Mr. Casterlin: There is another situation here,



(Testimony of John Davis Bradley.)

too, we have stipulated and agreed that so far as the reports are made on these smelter returns, there is no objection to it.

The Court: As I understand it, you offer to stipulate that the word "normal,"—first, I understand that the word "normal" is used in the definition of "net smelter returns" in the contract?

Mr. Casterlin: Yes.

The Court: And are you agreed as to what 'normal' means as there employed?

Mr. Casterlin: We are to this extent, that the normal charges are those which are included in the exemplars which we have admitted in evidence as being samples of smelter returns.

The Court: Aren't they the charges that smelters customarily make for that service?

Mr. Casterlin: Yes.

The Court: And wouldn't that be normal, it seems it would be to me unless it is used in some extraordinary sense I would say that the ordinary and usual signification of the word would be the usual, customary charge.

Mr. Ray: But that is not a term used customarily in the mining industry in connection with [100] the sale of concentrates to outside smelters.

The Court: I don't follow you, Mr. Ray, I am sorry.

Mr. Ray: I don't like to do the testifying.

The Court: No, that's right, but if there is no issue between you as to what the word "normal" means, why need we go into it?



(Testimony of John Davis Bradley.)

Mr. Ray: Your Honor, if I want to sell concentrates to the Harshaw Company from this property I don't say to them "I will sell these concentrates and you shall deduct normal smelting charges," that would be entirely contrary to custom and practice.

The Court: What do you say?

Mr. Ray: We say we will sell you these concentrates, what will you pay for them, and they say so much, here is a schedule.

The Court: Does that include the deductions ordinarily and usually made, normal deductions?

Mr. Ray: That might be entirely different than what somebody else would give for them.

The Court: Are you suggesting, Mr. Ray, that it is the practice and custom of the industry not to have any smelting charge, as such?

Mr. Ray: No, but I say this, you [101] have different situations. When I sell my concentrates to outside smelters I don't provide that he shall deduct normal or abnormal smelting charges or anything else.

The Court: But this contract provides "net smelter returns," contemplating that, doesn't it?

Mr. Ray: It provides that when I get to the smelter I will give him five per cent, smelting returns.

The Court: Is that the definition? The definition is "gross, after deducting the normal smelting charges plus transportation."

Mr. Ray: That's what I get from the smelter,

(Testimony of John Davis Bradley.)

the smelter deducts those charges.

The Court: Yes.

Mr. Ray: Now, if I smelt my own concentrates that question doesn't arise unless there is something, unless—it is from leased ground. And then, in order that I don't charge an indefensible treatment charge then I use the word "normal," and then only, or its equivalent.

The Court: The "normal" means just that, normal and reasonable, I suppose.

Mr. Ray: I think so.

The Court: It has been stipulated [102] here that whatever was deducted was a reasonable charge. Whatever has been deducted by the defendant for services of the Yellow Pine Smelter is a reasonable charge, isn't that stipulated by the Plaintiff?

Mr. Casterlin: That is the way I understand it.

Mr. Ray: It is stipulated that if we are entitled to any credit then the charge we have made is reasonable.

The Court: What's the difference?

Mr. Ray: Because this phrase "normal" indicates that this net smelting returns provision, also by the use and introduction of that word normal, it applies to our smelter, that is the factor that is in the contract that doesn't apply.

The Court: What do you propose to show by the witness?

Mr. Ray: I want to show that if they had contemplated that we would treat these concentrates

(Testimony of John Davis Bradley.)

in our own smelter and make smelting deductions for it, that word "normal" never would have been in the contract.

The Court: This witness won't be permitted to say that.

Mr. Ray: I wanted to point out, if I may, that this is the only type of contract in the [103] industry where the word "normal" is used.

The Court: Is there a pending question?

A. I was asked whether the word "normal" was in common useage in cases, I think the intent being non-lease ground.

Q. On sale to custom or outside smelters?

The Court: Suppose you rephrase the question, Mr. Ray.

Q. Is the word "normal" customarily used in connection with the sale of concentrates to outside smelters?      A. No.

Mr. Casterlin: That can be answered yes or no.

A. The answer is no.

The Court: I think possibly there was an objection to that question that I have not formally ruled on.

Mr. Casterlin: If the other question is withdrawn, I will not press the objection.

The Court: Very well.

Mr. Casterlin: I do not press any objection to this last question.

Q. You have given us some testimony with respect to study and discussions about the construction of a smelter at or near [104] the property

(Testimony of John Davis Bradley.)

which is described in this Contract, Exhibit Number 7. Did that discussion between you and the other side ever involve the possibility that some outsider would build a smelter there?      A. Never.

Q. According to your discussion, if the smelter was to be built at or near the site, who was to build it?

Mr. Casterlin: I am going to object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this action, and not pertaining to the clarification of any of the terms of the contract or its application to the Yellow Pine.

The Court: The objection is sustained to the question in that form on that ground. Are you attempting to elicit from this witness that there was, during the negotiations, a discussion between the Plaintiff and the Defendant about the possibility of the defendant or someone else building a smelter at the site, is that what you propose to show?

Mr. Ray: He has previously testified to that, without objection.

The Court: I think you should limit it to the time, lay the foundation for the conversation so that we can see if it was during the negotiations.

Q. I think your testimony was that from the time,—in the late thirties when you showed up at this property, discussions began respect the possibility of constructing this smelter at or near the site of this leased property, is that right?

(Testimony of John Davis Bradley.)

A. No, I said that we did not have discussions. I advised them of our progress, we did not have discussions with United if that is what you mean, we told them only of our progress.

Mr. Casterlin: ——I object to what he told them on the ground that no foundation is laid for a discussion of what was said and it would tend to alter the terms of the contract as drafted.

The Court: The objection is overruled.

Mr. Casterlin: It would not tend to interpret it and would invade the province of the Court.

The Court: Overruled.

Q. When did you talk to the people on the other side about the possibility of smelting, or local reduction?

A. We endeavored to keep United——

The Court: ——No, Mr. Bradley, just answer when.      A. At numerous times. [106]

The Court: Commencing when?

A. Commencing in late '38 through '40, I will say late thirties and through the forties.

The Court: During any of these talks did you make any statements,—first, with whom did you talk?

A. My contacts with United were with *Mrs. Oberbillig* and *Worthwine*.

The Court: Did you ever talk with Mr. Oberbillig about the possibility of a smelter being constructed at the mine?      A. Yes.

The Court: And when?

A. I don't recall precisely.



(Testimony of John Davis Bradley.)

The Court: About when?

A. The late thirties and through into the forties.

The Court: How late in the thirties?

A. Perhaps '38.

The Court: Do you recall any time in the forties before this contract was signed?

A. Specifically?

The Court: At the time you were negotiating this contract,—in 1941 was there any negotiations about it? [107]

A. Yes.

The Court: About what time, was it shortly before the contract was signed?

A. I think during the negotiations.

The Court: Over what period, we would have to have some idea?

A. Yes, 1940 and '41.

Q. When did the negotiations begin for this contract executed December 31, 1941?

A. As I stated previously, to the best of my memory, perhaps in the spring of '41, or it may have been before that.

The Court: After the spring of 1941, between that and the end of the year 1941, did you have any contact with Mr. Oberbillig or Mr. Worthwine about the possibility of a smelter being constructed at the site of the mine?

A. I don't think it would have been a point of discussion at that time.

The Court: No, I want to know was anything at all said or discussed.

A. My recollection is yes.

(Testimony of John Davis Bradley.)

The Court: Was anything said about who would build it or might build it?

A. I don't know that it was——

The Court: ——Not what was said, [108] but was anything said to Mr. Oberbillig or to Mr. Worthwine about who might build the smelter at the site of the mine.

A. May I put it this way, it was always assumed that the Bradley Mining Company would be the one that would build it if one was built. I would never enter a discussion by saying "We intend to build a smelter any certain year," but our work was progressing——

The Court: ——I asked was it discussed, about the possibility of one being built?     A. Yes.

The Court: The maybe's of the situation were discussed?     A. Yes.

The Court: And that referred to the possibility that the defendant here might build?

A. Yes.

Mr. Ray: I wanted Mr. Bradley to have before him a copy of the contract, it appears on Page 18 of the Circuit Court record, that is the portion I have in mind.

Q. (By Mr. Ray): Will you observe, Mr. Bradley, there in the first paragraph beginning on that page, "Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the [109] net smelter or reduction returns a fair charge for trucking from the mine to

(Testimony of John Davis Bradley.)

such smelter or reduction works." Now, was that provision discussed among you before this contract was signed?

A. Was it discussed before the contract was signed?

Q. Yes?            A. Yes.

Q. When I say discussed, I mean with the other side?            A. Yes.

Q. Was there any suggestion made that should reduction works be erected they would be erected by anyone except Bradley?            A. No.

Mr. Ray: I have two letters, one identified as Exhibit Number 22, and the other as Exhibit 21, both letters from Mr. Worthwine.

The Court: I didn't get those numbers.

Mr. Ray: Number 21 and 22.

The Court: Exhibits 21 and 22?

Mr. Ray: Yes, your Honor.

Mr. Casterlin: We object to the introduction——

The Court: ——They have not been offered yet.

Mr. Ray: We want to offer [110] Exhibits Number 21 and 22 in evidence.

The Court: As I understand it, it is or can be stipulated as to the genuineness with respect to the letter. Can counsel stipulate that the letter was written on or about the date it bears and was signed by the person purporting to sign it and was mailed about the date it bears to the person to whom it is addressed?

Mr. Casterlin: And was received by the person?

(Testimony of John Davis Bradley.)

The Court: And was received by the person to whom it was addressed?

Mr. Casterlin: Yes.

The Court: Very well.

Mr. Casterlin: Now, as to Exhibits Number 21 and 22, we object on the ground that they are incompetent, irrelevant and immaterial. They pertain to a prior negotiation and show on their face that the contents of them or any dispute which arose under them were merged in the written contract of December 31, 1941.

The Court: I would like to see the exhibits, Mr. Clerk.

Mr. Brown: We have considered, your Honor, that these are very material in this case and are properly admissible for this reason: In the first place, they are corroborative of Mr. Bradley's testimony [111] with respect to the discussions had with representatives of the United Mercury with respect to the erection of a Bradley Mining Company smelter.

Secondly, Exhibit 5 in this case is the Option Agreement and the Agreement between the parties in 1939. In that contract it was provided that should local reduction of the concentrates become practical as determined by the Optionee; in other words, explicitly pointing out in that contract that the parties had in mind that it would be Bradley who built the reduction plant or have a reduction plant. The 1941 contract, while it mentions the smelter, did not define it as a Bradley smelter, yet,

(Testimony of John Davis Bradley.)

from his testimony and these corroborating letters of Mr. Worthwine's which particularly mentions the fact, if you and your family,—I don't worry about you and your family building a smelter, I am thinking in the future, if this at sometime passed into the hands of someone else——

The Court: ——It may be corroborative, I don't know whether there is any auxiliary issue on the subject yet or not. It may be that these letters are properly admissible if the plaintiff, on rebuttal, makes an issue or takes issue with what this witness has said,—this witness said that there was some discussion about the possibility of a smelter being built by Bradley's. [112] Now, the details of the negotiations are quite another matter. I don't know whether the plaintiff will make an issue on rebuttal with respect to that or not. If the plaintiff does, then these letters may become admissible as being corroborative of this witness' testimony. But until that time comes I feel that I should sustain the objection. If you want those letters incorporated as excluded evidence in the record under Rule 43c, you may do so.

Mr. Brown: We do want them included in the record.

[See pages 387-394.]

The Court: It is so ordered.

Q. Mr. Bradley, I think you testified concurrently with the production of tungsten which was not sold to the smelter, you produced antimony



(Testimony of John Davis Bradley.)

concentrates and shipped them to—first, when did you build the Bradley smelter?

A. We started construction in '48 and completed it in '49.

Q. It went into operation did it in 1949?

A. Yes.

Q. How long did it operate?

A. It operated until 1952.

Q. And what was treated in that smelter?

A. Antimony and gold concentrates.

Q. After you started the operation of that smelter did you, thereafter, sell any antimony concentrates? [113]

A. Yes.

Q. To outsiders?              A. Yes.

Q. When and under what circumstances?

A. The circumstances were that the smelter was not performing too well and we had concentrates backed up ahead of it, and secondly, it was of interest to us to verify and confirm our settlement provisions with the United Mercury mines.

Q. What record was kept, if any, of the amount of concentrates that went into the Yellow Pine smelter?

A. The same record that was kept of the concentrates being shipped off the property to other smelters, which was, namely, by weight and quality control.

Q. Were the concentrates produced at your mine brought to the smelter by truck?

A. Yes, they were brought from the concen-

(Testimony of John Davis Bradley.)

trator to the mouth of the roasters by truck, but it was only a distance of approximately fifty feet, the reason being so that we could weigh on the truck scales the same as if the concentrates were being shipped to the rail head.

Q. So that you kept and maintained records of all of the concentrates that went into the smelter?

A. Yes sir.

Q. Was the amount of concentrates shipped to the outside [114] substantial as compared to the amounts of concentrates treated?

A. Yes sir.

Q. And over what period of time were you selling concentrates to the outside?

A. Over the entire period of time the smelter was operating. I must qualify a previous answer if I may. I mentioned that the antimony,—that we had made some spot shipments. However, during that same period of time we were shipping half of our gold concentrates to the Tacoma smelter.

Q. You smelted substantially all of your antimony concentrates?      A. Yes.

Q. But you sent approximately half of your gold concentrates to Tacoma?      A. Yes.

Q. Why did you divide the gold concentrates between your own smelter and the Tacoma smelter?

Mr. Casterlin: I object to the question as being incompetent, irrelevant and immaterial, and throwing no light on the issues involved here.

The Court: I can't determine yet whether it is

(Testimony of John Davis Bradley.)

or not, I will overrule it, it calls for a reason, doesn't it?

Mr. Ray: Yes, your Honor.

The Court: He may answer. [115]

A. The reason being twofold, one, we couldn't ship all of the gold concentrates to outside smelters and were limited to approximately 50%, therefore, we had to design our antimony plant to accept the other 50% of the gold concentrates.

The Court: Why couldn't you ship them all out?

A. The reason we couldn't ship them all out was owing to the high arsenic and antimony content in the gold concentrates and other smelters refused to accept such a heavy tonnage of gold concentrates.

The Court: Because of that content?

A. Yes, because of the arsenic and antimony in the gold concentrates.

The Court: And what effect would that have?

A. The concentrates were going to Tacoma and arsenic becomes a miserable impurity to remove and we cluttered up their entire circuits, getting into their copper and into their lead and every other metal, so that when our shipment with arsenic that was running several percent became too heavy they forewarned us, so that we had to make our plans for the antimony smelter to accept those, so we devised a metallurgy to keep our slag in balance and which required about half of the tonnage so it worked out satisfactorily [116] in either case, except in the case of our smelter it didn't work out satisfactorily overall economically.

(Testimony of John Davis Bradley.)

Q. Now, on the gold concentrates shipped to Tacoma, did you receive compensation from Tacoma? A. Yes.

Q. In what form, what did you call it?

A. Net smelter returns.

Q. Did you compute royalties due to the Plaintiff on the basis of those net smelter returns?

A. Yes.

Q. How did you compute the royalties paid on account of the gold concentrates treated in the Yellow Pine smelter?

A. On exactly the same basis as the net receipts from the American Smelting and Refining Company, except in the beginning we did not deduct any freight so that the United Mercury Mines benefitted substantially.

Q. How did you compute the royalties on the antimony concentrates treated in the Yellow Pine smelter?

A. On the basis of past practices of antimony shipments.

Q. To outside smelters?

A. To outside smelters.

The Court: When you shipped these gold concentrates to Tacoma did you receive payment for them? A. Yes.

Q. And did you compute royalties to the plaintiff on the basis [117] of five percent of what you received? A. Yes sir.

The Court: Did you report that account to the Plaintiff?

(Testimony of John Davis Bradley.)

A. Yes, on a monthly basis.

The Court: And did you explain that transaction?

A. Yes.

The Court: Is there any issue as to that?

Mr. Casterlin: On what was shipped to outside smelters?

The Court: To Tacoma.

Mr. Casterlin: No, there is no issue on that.

The Court: Over what period did that occur?

A. To Tacoma, that would have gone even prior to the construction of the smelter, right to the shut-down of the property in 1952, so it would probably be from 1946 to 1952.

The Court: On how many occasions did this type of transaction occur, that is, where you shipped gold concentrates to Tacoma, paid, and you would compute the royalty and report to the Plaintiff?

A. We were shipping concentrates at the rate of about 2,000 [118] tons a month, so it would occur about every day that we were shipping carloads of concentrates.

The Court: Then it would occur more than one time a week?

A. Yes, oh, yes.

Q. Did you report a basis for computing the royalty on antimony concentrates, — I don't mean antimony concentrates, — gold concentrates, that went through your own smelter and make those reports to the Plaintiff at the same time that you



(Testimony of John Davis Bradley.)

were making your reports on the concentrates that went to Tacoma?

A. On the same basis and at the same time.

Q. At the same intervals that you were reporting your own gold concentrates to Tacoma?

A. All throughout the operation of the smelter antimony concentrate returns were submitted to the United Mercury.

Q. Did you report to the Plaintiff your computation on account of antimony concentrates that were treated in your own smelter?

A. Yes, we reported to the Plaintiff.

Q. That was beginning then in August of 1949, and continuing until 1952?      A. Yes.

Q. Did the defendant compute and pay royalties in accordance with that method on all the concentrates, the antimony [119] concentrates that were ever treated by the Yellow Pine Smelter?

A. Yes.

Q. Mr. Bradley, if you please, was there ever any modification or supplement to the contract of December 31, 1941?

A. Yes, there was a supplemental agreement negotiated in 1950.

Mr. Ray: There has been identified in the record, a document, being Exhibit Number 6, I want to have it identified in this record. The Exhibit 6 is attached to the affidavit of John H. Bradley, dated 10-10-1951.

The Court: According to my notes, Exhibits 1

(Testimony of John Davis Bradley.)

to 7 are in the Clerk's file, I don't know where they are, do you have a copy of it?

Mr. Ray: I have a copy.

The Court: Do you agree on the genuineness of the document?

Mr. Casterlin: We will raise no question of the genuineness of the copy.

Q. Mr. Bradley, are you familiar with Exhibit Number 6?      A. Yes, I am.

Q. Is that a copy of the contract that we just referred to?      A. Yes, it is.

Q. Who are the parties to that agreement?

A. The Bradley Mining Company, United Mercury Mines and O. W. Worthwine.

Q. Who negotiated that contract on behalf of the Bradley Mining Company?      A. I did.

Q. And with whom for the other side?

A. It was with *Mr.'s* Worthwine and Oberbillig.

Q. Who prepared the draft of that contract?

A. Mr. Worthwine.

Mr. Ray: We offer Exhibit 6 in evidence.

Mr. Brown: That appears on Page 66 of this record (indicating).

The Court: Do you wish to state the purpose of the offer?

Mr. Ray: Yes, your Honor, we think it is important in connection with our defense in that it shows the interpretation by the parties of what the contract means, on the royalty basis, the computation of royalties.

The Court: Are you relying on the recitals in

(Testimony of John Davis Bradley.)

the Whereas clauses as being a substantive interpretation of the contract?

Mr. Ray: Yes, your Honor, stating that we have paid royalties to a certain time.

Mr. Casterlin: Royalties on what transaction?

The Court: I notice in the next to last [121] Whereas clause it says: "The said Bradley Mining Company did, on the 20th day of June, 1950, pay to the United Mercury Mines Company and said Oscar W. Worthwine, the royalties due for the month of May, 1950." Is that what you are relying upon?

Mr. Ray: Yes, your Honor.

The Court: I was wondering about the purpose of this myself, but apparently the purpose is in the next to the last Whereas clause.

Mr. Ray: There is another provision in there, too, your Honor, it is on Page 69.

The Court: 69 of the Transcript?

Mr. Ray: Yes sir. "It is further agreed that the said Bradley Mining Company shall make the usual monthly reports as to money received by it during the preceding month upon which royalties would be payable, stating the amounts of royalties that had accrued, but, instead of sending the check as has been the practice during the past ten years shall make a notation thereon to the effect that the above accrued royalty has been postponed." Now, that is the agreement that we continued to do it.

The Court: Emphasizing the word 'usual'.

(Testimony of John Davis Bradley.)

Mr. Ray: Yes, your Honor, and [122] that is written by the other side.

The Court: But that doesn't appear here.

Mr. Ray: The witness just stated that it was written by Mr. Worthwine.

Mr. Casterlin: May I ask a question?

The Court: You may.

Q. (By Mr. Casterlin): You say that in 1950 Mr. Worthwine was representing Mr. Oberbillig, is that correct?      A. Yes sir.

Q. And at the same time he was representing you as local counsel, was he not?      A. Yes.

Q. When did he first start representing you as local counsel, was it before December 31, 1941, or was it after? As a matter of fact, hasn't Mr. Worthwine been doing work for you, and representing you and your family since about 1929 or '30?

A. No.

Q. When did he start representing you?

A. I don't think that we had a representative, as such, Mr. Casterlin. Mr. Davis was our San Francisco attorney, our family, company attorney, and I don't believe that we designated Mr. Worthwine, even as our Idaho counsel, until [123] Mr. Davis got tied up in the war. I was trying to recollect, I wasn't trying to dodge the answer, until Mr. Davis left San Francisco and went to Washington we looked to him, naturally, for all of our legal work. It came about that after he left Mr. Worthwine took on the Idaho load without really clearing, at times, with Mr. Davis, owing to his absence.

(Testimony of John Davis Bradley.)

Q. He was your attorney at the time this 1950 contract was drawn?

A. Yes, he was acting as our local counsel. I think it would have been submitted to Mr. Davis in 1950 for confirmation, however.

Mr. Casterlin: I think I will object to this as incompetent, irrelevant and immaterial, it tends to alter the terms of a written contract. It purports to be merely an extension of time of payment of royalties under the original contract and, therefore, whatever terms are used would have reference to the original contract and simply be a postponement of the royalties required to be paid by the original contract.

The Court: It seems to me that the objection goes to the weight rather than the admissibility of this. The objection will be overruled and Exhibit Number 6 will be admitted in evidence. [124]

[See pages 377-381.]

Q. (By Mr. Ray): Mr. Bradley, the contract just referred to, Exhibit Number 6, provides for the suspension of royalties payments for a time, does it not? A. Yes.

Q. Were those royalties that were suspended ultimately paid? A. Yes.

Q. Did you, during the month following the execution of Exhibit Number 6, make a report to the plaintiff showing what royalties had accumulated and would have been paid except for this suspension? A. Yes, we did.

Q. Now, you have testified that Mr. Worthwine



(Testimony of John Davis Bradley.)

participated in and wrote this agreement. He was a party to the agreement itself, wasn't he?

A. Yes.

Q. And he was a participant in the royalty, isn't that so?      A. That is correct.

Q. Up until the time you prepared Exhibit 6 in July of 1950 had Mr. Worthwine ever objected to the method by which you computed royalty on the concentrates treated in the Yellow Pine Smelter?

A. No, he had not.

Q. Has he ever to this day objected to it?

A. No, he has not. [125]

Mr. Casterlin: Now, I move to strike the answer for the purpose of objection.

The Court: State your objection, Mr. Casterlin.

Mr. Casterlin: The objection is that Mr. Worthwine might have been dealing with his own interests, it is not shown that he had any authority to deal with the royalties that were coming from Bradley to the United Mercury.

The Court: Your objection goes, not that he was not acting in his own interest,—

Mr. Casterlin: —No.

The Court: —but that it was his own interests and not the interest of the plaintiff, that there was no showing of authority, did I understand?

Mr. Casterlin: Yes.

The Court: The objection is sustained and the answer may be stricken. The motion to strike the answer is granted.

Q. Mr. Bradley, did Mr. Oberbillig, or anybody

(Testimony of John Davis Bradley.)

representing the United, ever object to the method in which you had been computing the royalties on the materials that went through the Yellow Pine smelter?

Mr. Casterlin: We object to that on the grounds that it is a dual question—no, I will withdraw [126] the objection.

The Court: Will you read that question for me, Mr. Reporter.

(Question read by Reporter.)

Mr. Casterlin: I have withdrawn my objection.

The Court: Very well, the witness may answer.

A. No, not until 1951.

Q. When, if you recollect in 1951?

A. I don't recollect, maybe it was mid-year, but I don't recall.

Q. Mr. Bradley, to your recollection, was the first objection ever made by the plaintiff, in 1951?

A. Yes.

Q. At that time had you been computing and paying the royalties for approximately two years?

A. Yes.

Mr. Ray: We are nearing the end of our examination, your Honor, and I wonder if we might have the indulgence of the Court for a few minutes.

The Court: Yes, we will take a five minute recess.

March 19, 1957, 4:25 o'clock p.m.

Q. Mr. Bradley, in answering questions put to you by His Honor you spoke of the economic neces-

(Testimony of John Davis Bradley.)

sity of mine products being [127] concentrated, because of the cost of shipment, before they were shipped to the consumer or the smelter, is that so?

A. That is so except in unusual cases where the ore is sufficiently highgrade that it will stand the freight.

Q. Is it customary throughout the mining industry for mines to be equipped with some sort of concentration facilities?      A. Yes.

Mr. Casterlin: We object to that unless it is confined to the area where the property is situated.

Mr. Ray: I said throughout the industry, including Stibnite.

The Court: Overruled.

A. If it is any size mine at all it would normally have a concentrator on it.

Q. In the industry can you state whether or not the number of mines outnumber the number of smelters?      A. By a wide margin.

Q. Is it economical in the mining industry for the ordinary mine to be equipped with a smelter?

A. For the ordinary mine to be equipped with a smelter?

Q. Yes.

A. No, it is not, may I cite an example.

Mr. Casterlin: I will stipulate that is a fact.

Mr. Ray: If you stipulate that [128] is a fact, very well.

Q. What did it cost to construct the Stibnite smelter?

(Testimony of John Davis Bradley.)

Mr. Casterlin: That is objected to as incompetent, irrelevant and immaterial.

The Court: What is the purpose of that?

Mr. Ray: I think there is a rule of law, your Honor, that in construing a contract if the meaning is uncertain that the contract will be construed in view of all the significant facts and there will not be given a construction which works a hardship on one party and unjustly enriches the other.

The Court: But this smelter didn't exist at the time this contract was formed.

Mr. Ray: That is true, but we contend that the parties never intended, and the circumstances show, that they never intended that the plaintiff should get a five percent royalty on concentrates after smelting costs had been deducted if they go to Tacoma, but that they would get the smelting free if it goes to the Yellow Pine.

The Court: There is no contention here that the Plaintiff ask that this smelter be constructed, is there?

Mr. Ray: I understand that, but it was. [129]

The Court: I suppose that the defendant constructed it in its own interest, the fact that it may have redounded to the plaintiff's interests also is immaterial here.

Mr. Ray: The contract doesn't provide that there shall be two rates of royalty, one if the concentrates were treated in one place, and one if they were treated in another.

The Court: The objection is sustained. If you

(Testimony of John Davis Bradley.)

wish the answer in the record under the excluded evidence rule, you may have the answer.

Mr. Ray: I would like to have him answer that question as to what it cost.

A. Approximately two million dollars, including homes for a few of the smelter workers.

Q. And who paid that amount?

A. The Bradley Mining Company.

Q. Who operated it thereafter?

A. The Bradley Mining Company.

Q. Who put up the operating expenses?

A. The Bradley Mining Company.

Q. And what did they amount to?

Mr. Casterlin: I think now that we are getting into the operating expenses, and I object to that as incompetent, irrelevant and immaterial, and not within [130] the purview of the first question.

The Court: I assume this is all excluded evidence under the rule, though some of it I would admit. I would admit the evidence as to who paid the operating expenses.

Mr. Ray: And how much they were.

The Court: That is the next question.

Mr. Ray: Yes.

The Court: And that would be excluded evidence.

Mr. Ray: Very well.

A. Approximately a million and a half a year, for the smelter alone.

The Court: Does that terminate the evidence excluded?



(Testimony of John Davis Bradley.)

Mr. Ray: That is all of that.

The Court: Then all of that with respect to the construction of the smelter, except the statement that the defendant paid the operating expenses, will be excluded evidence under the rule.

Q. Mr. Bradley, does the word, the term 'gross royalty from ores mined' have an understood meaning in the mining industry?

A. Yes, I feel that it does.

Q. What does it mean? [131]

Mr. Casterlin: I object to that as being an interpretation of the contract on the part of one party.

The Court: The objection will be sustained to the question in that form, and you may rephrase it tomorrow morning. We will recess until ten o'clock.

March 20, 1957, 10:00 o'clock a.m.

Mr. Ray: Shall we proceed, your Honor?

The Court: Yes, I believe that Mr. Bradley was still on the stand.

Q. (By Mr. Ray): Mr. Bradley, there is a question I would like to ask you in the interest of clarification. You testified yesterday that there were certain products which at one time went to the mint and at other times went to smelters and at other times went to purchasers other than smelters. Now, was it the value or the character of the product that determined where it went?

A. Principally the character .

Q. And you testified with respect to tungsten that it had that character that required it to go to

(Testimony of John Davis Bradley.)

places other than smelters?     A. Correct. [132]

Q. Would you testify now, please, as to relatively what was the importance of tungsten as compared to the other products produced during the several years next following January 1st, 1942?

A. Tungsten was by far the predominant product.

Q. Tonnage wise or dollar wise?

A. Definitely dollar wise, but I think also tonnage wise.

Mr. Ray: If the Court please, yesterday we offered Exhibit 5 A, and it was excluded. Your Honor permitted me to ask questions which would be embraced in rejected evidence. With your Honor's indulgence I would like to pursue that matter a little further.

The Court: Now, you are resuming the record of excluded evidence now under Rule 43 c with respect to Exhibit Number 5 A.

Mr. Ray: That is correct, if I may.

The Court: You may.

Mr. Ray: I would like to have the witness handed this document.

Q. Will you examine Exhibit Number 5 A, Mr. Bradley, and tell me whether it contains a provision covering net smelter returns?

A. Yes, it does. [133]

Q. Does it contain a provision covering net mint returns?     A. Yes.

Q. Does it contain a provision covering net rev-

(Testimony of John Davis Bradley.)

enue as we have been speaking about it in this case, as it was submitted to you?

A. As submitted to me it covered net mill returns.

Q. I want you to state whether or not it contained a net revenue clause?

A. As submitted to me it did not.

Q. But it did contain a clause respecting net mill returns, will you read that?

A. "By net mill returns, as used herein, is meant the net amount paid by any milling company, with the right of said milling company to deduct milling charges only."

Q. During your discussions with Mr. Worthwine respecting that draft, what was done with that 'net mill returns'?

A. That became the net revenue clause.

Q. You mean by that that it was deleted from the draft?

A. Yes 'net mill returns' was deleted.

Q. And there was substituted for it the net revenue clause? .      A. Yes sir.

Q. Written in your handwriting?

A. Yes sir.

Q. Did you then explain to Mr. Worthwine why you suggested the change from net milling to net revenue?

A. I am sure that I must have. [134]

Q. What did you state?

A. Well, number one, we had a product that didn't answer net smelter or net mint, and net mill

(Testimony of John Davis Bradley.)

didn't seem to me to be the proper definition for it. That product, of course, being tungsten.

Q. There wasn't tungsten in '39, was there?

A. No. I beg your pardon, in 1939 there was no tungsten.

Q. Was there mercury?

A. There was mercury. There were indications that there might be other minerals that wouldn't come under the net mint or net smelter.

Q. And was that the reason that you suggested the substitution of net revenue clause for net milling clause?

A. We were hunting for a clause that would cover products that would not go to a mint, such as gold bullion, or sulfide concentrates that would go to a smelter.

Mr. Ray: Now, I have concluded my offer, your Honor, with respect to excluded evidence.

The Court: Very well.

Mr. Ray: And with that I would like to renew my offer of Exhibit 5 A.

The Court: At this point the record may show that the evidence respecting the excluded evidence under the rule is terminated as to the offer of Exhibit 5 A. You now renew the offer of the exhibit?

Mr. Ray: Yes, your Honor, we renew our offer.

Mr. Casterlin: We renew our objection.

The Court: What is the purpose of the offer?

Mr. Ray: The offer is to show that the reason for the inclusion of this net revenue clause in the 1939 agreement was to take care of the products

(Testimony of John Davis Bradley.)

that would not go to a smelter or mint and be subject to net mint or net smelter returns.

The Court: Exhibit 5 A never came into being as a legally effective document.

Mr. Ray: No, but the net revenue provision that appears in Mr. Bradley's handwriting on Page 3 did come into both Exhibit 5 and Exhibit 7, in Exhibit 5 first and then it was retained in Exhibit 7.

Mr. Casterlin: The dilemma that we are in now is that they have some evidence in here that possibly might be admissible and some which would not be admissible, and the portion which is not admissible, not being objected to at the time the evidence was offered,—if that was segregated I am sure there would be some that we would have no objection to.

The Court: You mean of the testimony in the record which has just been made of excluded evidence. [136]

Mr. Casterlin: Yes.

The Court: What do you have in mind, Mr. Casterlin, withdrawing your objection to some of it?

Mr. Casterlin: No, not as the record now stands.

The Court: I don't know just what you have in mind at this time.

Mr. Casterlin: The situation is just this, your Honor, when they were offering evidence which was denied, now, if the ruling is changed and admits it then we have been deprived of our right to object to certain phases of it.

The Court: I probably misunderstood you, I



(Testimony of John Davis Bradley.)

thought there was a suggestion by you that some of the evidence in the record of excluded evidence might be admissible.

Mr. Casterlin: That is right, your Honor, if it is offered not as a part of the denied evidence, but it was all offered during the offer made of denied evidence.

The Court: As to what part, Mr. Casterlin, do you have no objection?

Mr. Casterlin: I think I will let the record stand just as it is. [137]

The Court: I take it that the defendant offered the evidence anticipating the ruling heretofore made by the Court and offered it as excluded evidence. Now, if there is no objection to any part of it I will receive it.

Mr. Casterlin: We do have objection to parts of it.

The Court: Is there part you have no objection to?

Mr. Casterlin: I think we will let the record stand and probably bring the matter back in in another way.

The Court: The record will stand as now made, you have a record of excluded evidence. The objection is sustained. It seems to me that the question regarding Exhibit 5 A, after the admission of Exhibit 5, it seems just an attempt to bring in surrounding circumstances one step removed, circumstances surrounding the execution of the contract of 1939, Exhibit 5, to aid in the interpretation of

(Testimony of John Davis Bradley.)

the 1941 contract or agreement, which as I recall, is Exhibit 7.

Mr. Ray: It was my purpose, and I don't want to argue a matter after the ruling of the Court, but there was a reason which both parties recognized for bringing that into their dealings. That was the particular [138] purpose, it was to reach a particular goal, that provision, the net revenue clause. Prior to that time they were operating under a contract of net profit, which had nothing to do with smelter returns or mint returns, or anything else, and they were shifting to a new type of agreement, and this new type of agreement, as submitted, contained the mint return and smelter return clause, and it contained a mill return clause, which Mr. Bradley testified in the custom of his trade would not meet certain products that they were or might be producing. Therefore, the parties agreed that it was necessary to introduce something into this contract which would take care of mercury or other products which wouldn't go to the mint or the smelter. That was the purpose of its introduction,—that was the reason they agreed to eliminate the milling clause, and insert the net revenue clause. Now, when you get into that meeting with Mr. Bradley and Mr. Worthwine at that discussion, then, you are in the circumstances out of which the contract grew.

The Court: Out of which the 1939 contract grew.

Mr. Ray: Yes, and that was carried over into the 1941 contract.

The Court: That is a matter of argument, the

(Testimony of John Davis Bradley.)

ruling stands with respect to Exhibit 5 A, [139] the objection is sustained.

Q. Mr. Bradley, does the smelting process add value to the products of the mine?      A. Yes.

Q. Will you explain that briefly?

A. Well, the——

Mr. Casterlin: I object to this on the ground that it is incompetent, immaterial and irrelevant as to the value of the mines or the minerals in view of the fact that Bradley is the owner of the mine, the owner of the minerals that are in the ground and the United Mercury has no interest in those at all. This would be immaterial and would constitute a self-serving declaration.

The Court: And what would be the purpose, Mr. Ray?

Mr. Ray: This is introductory to some questions with respect to the uniform practices and customs in the industry.

Mr. Casterlin: Now, Mr. Ray, I understand that there is a little dispute here. At any rate, I am not clear as to your position, in one instance you have stated that this net revenue clause is not according to the custom in the industry and is peculiar to this situation. [140]

Mr. Ray: I said it was not a standard clause frequently found in use in the industry, but was brought into the contract to take care of this particular situation.

Mr. Casterlin: Yes, and in another instance you

(Testimony of John Davis Bradley.)

introduced evidence as to custom with respect to this same subject matter.

The Court: What is the purpose of this, there is no objection and nothing before the Court.

Mr. Casterlin: I realize that, your Honor, and I suppose that I am out of order and I apologize to the Court. My question of Mr. Ray was for the purpose of objecting to certain testimony, questions that might be asked if I knew the theory on which they were proceeding.

The Court: You made the inquiry as to the purpose and this statement was made by Mr. Ray that it was preliminary to show the practice.

Mr. Ray: That is correct.

The Court: There was an objection, as I recall now, to the last question. Will you read the question, Mr. Reporter?

(Question read by reporter.)

The Court: The objection is overruled [141] and he may answer.

A. You are taking, in effect, a crude material that is very close to its native state, still containing gang materials, impurities such as arsenic, sulphur and so forth. The product from the mine, being the product from the mine and the concentrator not having any use, whereas the end product after smelting and refining having a use, it being reduced down to its final state for manufacturing purposes. An example in case of antimony is the history and practice of the trade has been that the ore or con-



(Testimony of John Davis Bradley.)

concentrates is approximately one-half of the value of the finished product.

Q. Mr. Bardley, within the mining and smelting industry would the expression "the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs", within the usage of the industry, would that expression be recognized as included within those values,—the values added to the product by refining in a smelter?

Mr. Casterlin: I will object to that question as invading the province of the Court and calling for an answer to the ultimate question here.

The Court: Sustained. You may make a record of excluded evidence as to that if you desire. [142]

Mr. Ray: I would like to make a record, your Honor.

The Court: You may answer, Mr. Bradley, and the answer will be in the record of excluded evidence.

A. May I have the first portion of that question again?

Mr. Ray: I will restate the question if I may?

The Court: You may.

Q. Within the mining and smelting industry, according to its customs and practices, would the expression "the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs," be considered



(Testimony of John Davis Bradley.)

as included the values added to the mined products by refining in a smelter?

A. Definitely not.

Mr. Casterlin: And to that we renew the same objection.

The Court: And the same ruling,—the answer may come in and be in the record of excluded evidence.

A. The answer is in the negative.

Mr. Ray: There is a further question I would like to ask, your Honor, and I don't [143] know what your Honor's ruling will be, but it is kin to this.

Q. I am referring, Mr. Bradley, to the provisions of the Revenue Code, Section 114 (b)(4)(B), the 1939 Code, which relates to the depletion. I read this language: "As used in this paragraph the terms 'gross income from the property' means the gross income from mining." Would you say whether or not that language reflects, and is in harmony with, the customs, practices and usage in the mining industry? A. Yes.

Mr. Casterlin: I interpose the following objection: by the language of the statute the definition is confined to the particular act for revenue purposes only and revenue is not an issue here. The second ground is that it invades the province of the Court and the third ground, the witness is not qualified to interpret the statute.

Mr. Ray: I am not asking for an interpretation

(Testimony of John Davis Bradley.)

of the statute, I am asking if that language is in accord with with the custom, usage and practice.

The Court: The objection is sustained but the answer may stay in the record as a record of excluded evidence.

Q. At the time the 1941 agreement was written, was there any particular reason of recent occurrence for the inclusion [144] in the 1941 contract for the net revenue clause?      A. Yes.

Q. What was that reason?

A. The discovery of tungsten and the knowledge of mercury in the district.

Mr. Casterlin: Is this going in under the excluded evidence rule?

Mr. Ray: No, sir.

The Court: It is only this question, there was no objection made to the last question.

Mr. Casterlin: I was just wondering whether it was asked under the excluded testimony rule.

The Court: Do you desire to make an objection?

Mr. Casterlin: What was that question?

The Court: Read the question, Mr. Reporter.

(Question read by reporter.)

Mr. Casterlin: No, I have no objection.

Q. Mr. Bradley, are the terms "gross royalty" and "net royalty" frequently used in the mining and smelting industry?

Mr. Casterlin: We object to that on the ground that it is not shown that there is any ambiguity or uncertainty in the terms.

Mr. Ray: I am not addressing myself [145]

(Testimony of John Davis Bradley.)

at this time, if the Court please, to the contract. I am addressing myself to the two letters which occur on Page 180 and 181 of the transcript, received in evidence.

The Court: What are those letters, what are the exhibits?

Mr. Casterlin: They are two letters which were submitted and I think, as counsel says, they appear on Page 180 and 181.

The Court: They are here as a part of this record as Exhibits 26 and 26A.

Mr. Ray: Yes, your Honor.

The Court: The terminology used in those letters, you are asking the witness if those terms have any special signification in the mining and smelting industry.

Mr. Ray: My position is that they appear in the two letters, they appear as net in one place and gross in the other, and we take the position that we have a right to explain what is understood and what those terms mean in the mining industry.

The Court: Wouldn't it be a necessary foundation first to ask him whether at that time these terms had any specific signification in the mining industry, with mining men or in the mining industry generally?

Q. I call your attention, Mr. Bradley, to Exhibit Number 26, [146] which is a letter addressed by you to Mr. Oberbillig and Mr. Dorsey, dated January 29, 1942, and also another letter dated March 17, 1947. At either or both of those times

(Testimony of John Davis Bradley.)

were the terms net royalties and gross royalties terms in common use and practice in the mining industry?      A. Yes, sir, they were.

Q. How were those terms understood by the mining industry?

Mr. Casterlin: I object to that question on the ground that it is not a question of how a simple expression which is common to all commercial economic activities is understood in the mining industries.

The Court: Stated in that form, it seems to me that it would be necessary to first show that those terms had some special signification apart from their everyday meaning, in the mining industry.

Q. Did the term "net royalty" have some special significance in the mining industry?      A. Yes.

Q. What was that special significance?

A. When one sort of looks at the word "net" without any qualification it was normally assumed that it was on the sharing of the profits.

Q. And what is a gross royalty?

A. A gross royalty would be tied to the income from the mine itself, the net returns from the sale of the ore or concentrates. [147]

Q. Without regard to profit?

A. Without regard to profit.

Q. Now, what is the net sale?

Mr. Casterlin: Before you go to the next question,—I now move to strike the answers to the last two questions on the ground that it is now evident

(Testimony of John Davis Bradley.)

that the term net and the term gross are common to all commercial transactions.

The Court: Perhaps as to net, but not as to gross. As I understood the witness, gross doesn't really mean that, it means after certain processes have taken place. I presume it is just another way of saying that it is the returns from the first marketable product. The motion will be granted. Do you wish, Mr. Ray, that testimony to stay in the record under the Rules as excluded evidence?

Mr. Ray: Yes, please.

The Court: Very well, it may be in the record as excluded evidence under the Rule.

Mr. Ray: May we have a short recess at this time, we may have nothing further to offer.

The Court: Yes, we will take a short recess, five minutes [148]

March 20, 1957, 10:45 O'Clock A. M.

Mr. Ray: If the Court please, I have handed Mr. Bradley a copy of the Transcript of the Record, I take it that is permissible.

The Court: You mean the record in the Court of Appeals?

Mr. Ray: Yes, I want to ask him some further questions which I assume is in pursuit of excluded evidence, and I am going to refer to Page 180 and 181.

The Court: Now, you are referring to some other correspondence?



(Testimony of John Davis Bradley.)

Mr. Ray: I am referring to the letters that I referred to a few moments ago.

The Court: Which are a part of Exhibits 26 and 26A?

Mr. Ray: Yes, your Honor.

The Court: So when you are referring to transcripts you are really referring to Exhibits 26 and 26A.

Mr. Ray: That would be correct.

Q. Mr. Bradley, in Exhibit Number 26, you refer to a 5% royalty on net sales proceeds and in Exhibit 26A you refer to a 5% gross royalty?

A. Yes.

Q. In the practice and custom of the mining industry is there any difference between a 5% royalty on net sales and a 5% gross royalty?

Mr. Casterlin: I understand this is under the Rule?

Mr. Ray: Yes.

A. No.

Q. Will you explain what, according to the practice and usage in the mining industry, each of those mean?

A. All reference to royalties in the instance of mining refers to royalty on the value of the mined product, and you attach the amount, which in this case is 5%, and it is all under the theory,—the broad theory of net smelter returns, whether it be stated as net sales proceeds or as gross income from mining. The gross in mining language ap-

(Testimony of John Davis Bradley.)

plies to the sales, the net sales returns, the net sales returns taken from the mining property.

Q. Before or after smelting and refining?

A. Definitely before any processing that would change the character of the product. In mining parlance you are either talking about ore that is high enough in grade to ship or an ore that has to be concentrated to make it shippable, but you never talk about a smelted product when you talk about royalties, I never heard of such a thing. [150]

Mr. Ray: Now, your Honor, that is the end of the excluded evidence.

Q. Mr. Bradley, would you now turn to Page 17 of the Transcript and you are now referring to Exhibit 7, the contract of December 31, 1941, and I call your attention particularly to the words in the second paragraph: "Produced from said properties." In the customs and practice of the mining industry is there a recognized meaning for the words "produced from the properties?"

A. Yes, sir, that is——

Mr. Casterlin: ——I submit that the question has been answered.

Q. What is the recognized meaning?

Mr. Casterlin: I object to this question until it is first shown that there is some uncertainty and ambiguity in the language, which is contained in the contract of December 31, 1941, or until it is shown that there is some peculiar meaning in the mining industry which is not common to other practices.

(Testimony of John Davis Bradley.)

The Court: It would seem to me that it would be first necessary to lay the foundation to show that the terminology in the mining industry means something different or apart from the everyday and ordinary signification of the words. [151]

Mr. Ray: Perhaps I can ask a preliminary question.

Q. Mr. Bradley, in 1941, when this contract was entered into, what did the property consist of?

A. The properties covered by the agreement included such mining claims,—some were patented and others were unpatented, they were, mining facilities and concentrating facilities and of course, homes and schools.

Q. Was there any smelter there?      A. No.

Q. Now then, in the mining industry does it sometimes occur that there are smelting facilities upon mining ground?      A. Yes.

Q. And sometimes there are not smelting facilities on mining ground?

A. That is correct.

Q. Are there occasionally situations in the mining industry in which, in addition to all mining facilities, there are some other facilities which is not smelting but still outside of the area of mining? Some process that might not be strictly smelting, but also is not mining, such as the leaching of concentrates and that sort of thing?

A. Well, I was trying to catalog your question, Mr. Ray. By the Revenue Code, it is either one way or the other, and you do have some marginal

(Testimony of John Davis Bradley.)

points, I grant, such as [152] cyaniding, quicksilver and leaching, that are specifically mentioned as includable, and certain forms of roasting ahead of cyanidation that are all a part of mining.

Q. Now, where your properties include no smelting or refining facilities, what, in the practice and customs of the mining industry, is included within the words "products of the property?"

Mr. Casterlin: Now, I object to that on the ground that it is incompetent and irrelevant, and proper foundation has not been laid. The contract itself shows that this mining ground is owned by Bradley and the evidence in this case also shows that this net revenue clause was inserted in here at his request, in Bradley's own handwriting, and consequently it would be self-serving.

The Court: The evidence does not so show, Mr. Casterlin, as to these exhibits.

Mr. Casterlin: Then I will withdraw that portion of the objection. Yes, that is right, your Honor.

Mr. Ray: The contention is made by the Plaintiff that the proceeds from the property include not only the value of the product taken from the mining property but the refining and smelting.

The Court: Yes, I understand, but let's determine whether this term has some special signification or connotation in the mining industry other than the everyday meaning of the word. It seems to me to be immaterial. Now, when mining men refer today to mining, that may be a term of spe-

(Testimony of John Davis Bradley.)

cial connotation, that is, in the mining industry. It may include certain steps and may not include other steps. Now, if that is what you want to show.

Mr. Ray: I thought that is what I was asking.

Q. Mr. Bradley, does that have a particular meaning in the mining industry?

A. Does what have a particular meaning?

Q. Products produced from the mining property?      A. Yes, it does.

Q. As distinguished from the product of a shoe factory or a dairy?      A. Yes, I would say so.

Q. And what is that peculiar meaning that it has in the mining industry?

A. Produced or taken from a mining property means extracted and, perhaps, concentrated, or, in the instance of the Yellow Pine where we had different types of ores, oxidized, we had leaching, roasting, some cyaniding, in addition to flotation [154] concentration, specific gravity work, we had the whole gamut. I am not certain that I have answered your question, Mr. Ray.

Q. What does that, taken from the property, what does that mean, produced from the property?

Mr. Casterlin: I object to this on the ground that it is a self-serving declaration and invades the province of the court. Those words are all simple.

The Court: They may be simple, Mr. Casterlin, but they may have some particular meaning in the mining industry.

Mr. Casterlin: But that simple phase in here "produced from said properties", that has no pecu-



(Testimony of John Davis Bradley.)

liar meaning aside from the generally accepted meaning of the terms.

The Court: That isn't the question being asked now.

Mr. Ray: He has testified that the phrase does have a special meaning and I am asking him now what it is.

The Court: The objection is overruled, he may answer that.

Q. I think you have stated, Mr. Bradley, with respect to your property that the meaning of 'produced from the property' meant extracted from the property plus certain things? [155]

A. Yes.

Q. Now, did it include anything beyond those certain things?

A. Produced from the property means to me, mining or extraction and, if necessary, concentration.

The Court: Not what it means to you, what it means in the mining industry generally, or what did it mean at that time.

A. That is what it means, that is what it meant, and I know of no other construction by common usage of the term other than what I have just stated.

Q. And that is before it is shipped away from treatment, which was outside of the realm of mining?

A. That is correct.

Mr. Casterlin: Now, we object to that as being leading and suggestive.

(Testimony of John Davis Bradley.)

The Court: Sustained, and the answer is ordered stricken.

Q. Where did mining stop, at what point did it stop, that is, that comes within the industry's understanding of the word 'produced,' where did it stop?

A. It stops at the point where you receive your returns from the products from the mine.

Q. Where does production from the mine stop, maybe I better put it that way, as distinguished from some further process of production? [156]

A. The product from the mine stops when the production process is complete so far as mining concentration terminology is concerned. It does not involve steps such as smelting that completely change the character and reduce the mined product to a metal.

The Court: Does mining itself, what constitutes mining, is that a term of any particular significance in the mining industry, as applied to different ores?

A. You have different mining methods, but mining is extraction.

The Court: For instance, you speak of mining gold ore, does that purport certain processes to a mining man, might not it be applicable to mining gold and cinnabar and tungsten?

A. No, sir, when you say mining, I don't think that you are describing the actual method of mining, but it describes the phase of the work being done, it is not sufficiently definitive to say what type of mining is being done but it does describe

(Testimony of John Davis Bradley.)

the extraction from the ground and any concentration.

The Court: That is what I was getting at. For instance,—of course, we are talking about the time of the contract,—if you said to a mining man at this time, that is, in 1941, we are mining cinnabar [157] or we are mining tungsten, what would that mean to a mining man, if you said we are mining tungsten up there, what would that mean to him that you were doing?

A. At that time a mining man would have thought that was pretty good.

The Court: That is not exactly what I am getting at, what if a man said "What are you doing there" and the answer was "we are mining gold ore", now, to a mining man, would that convey to him that you are doing certain things or were doing certain things up there at that mine? Everybody knows that mining means taking something out of the ground, that step is included in any definition of mining, I presume, but when you say to a mining man "we are mining quicksilver", does that convey to him that you are doing certain things?

A. Yes.

Q. Besides taking something out of the ground?

A. Yes.

The Court: What does it mean?

A. When you say you are mining quicksilver, you couldn't be mining it successfully—

The Court: —Mr. Bradley, just tell us posi-

(Testimony of John Davis Bradley.)

tively, don't argue, tell us positively what it means. If you meet a miner on the street, or met a miner on the street in December, 1941, if you met him [158] on the streets of Boise and he said "What are you doing up there at Yellow Pine?" and you say "We are mining quicksilver right now", what does that mean to him that you are doing up there?

A. It means to him that you are mining and——

The Court: ——That you are taking something out of the ground?

A. Yes, and recovering the quicksilver. By recovering I mean roasting.

The Court: That you are digging ore out of the ground and what else?

A. It means that you are roasting and condensing the quicksilver.

The Court: Anything else?

A. Marketing it.

The Court: Marketing what?

A. The quicksilver, the finished product.

The Court: And that is what mining quicksilver would mean to him there. All right, now then, if you said we are mining gold up there, what would that mean?

A. Well, I think you would usually describe each one. If you say "We have a gold mine", then he would probably say "At what rate are you mining" or "how are you mining".

The Court: But that isn't what he asked, [159] he didn't ask how you were doing it, he simply said "what are you doing", he didn't say are you

(Testimony of John Davis Bradley.)

making money or getting rich, he said "what are you doing up there at that hole in the ground" and you would say "we are mining gold". Now then, what would that mean to another mining man, what would that mean in December of 1941 that you are or were doing. Would he have a mental picture of what your operation was?

A. I think you would have to qualify it.

The Court: What if you didn't tell him any more than that, would that have any special meaning to him?

A. It would mean, in the normal instance, that you were extracting ore and concentrating it.

The Court: And then what?

A. Well, cyaniding it.

The Court: Cyaniding it or otherwise concentrating it?

A. If it is sulfide you are concentrating it and shipping the concentrates.

The Court: Shipping it where?

A. To a smelter.

The Court: And having it smelted into metal?

A. That is right. [160]

The Court: And if you said that you were mining gold, would that connote something different to him than if you said you were mining quicksilver?

A. Because you would have a different process in concentrating gold, you could hardly have a clean highgrade gold so that it didn't need concentrating.

The Court: I am speaking of the ordinary ter-



(Testimony of John Davis Bradley.)

minology. I suppose that you could have a vein of free gold?

A. It has been done.

The Court: Yes, but you would probably tell him all about that, but if you said you were mining gold up there what would that mean to a mining man, what would it normally mean to a mining man, if it meant anything special.

A. I am afraid I am not getting the point there.

The Court: Well, let's go to something else. Suppose you said that you were mining tungsten up there, would that impart to him any mental picture, as a mining man, of what process you were going through if he knew mining?

A. It would depend on the mineral.

The Court: But you said tungsten.

A. No, I said it would depend on what mineral of tungsten, tungsten is the metal, the element.

The Court: I don't know enough about it to know what mineral you are talking about, if I were a mining man I might know. What would you tell him you were mining up here in the way of tungsten?

A. I might say we are mining tungsten, and he might say, what mineral are you mining and I would say scheelite.

The Court: Now we are probably where we should have been had I known enough to ask the question. If you said "well, we are mining scheelite", would that impart to a mining man a picture of a certain process, it would indicate that

(Testimony of John Davis Bradley.)

you were taking ore out of the ground, and anything else?

A. It would indicate to him that certainly that ore had to be concentrated or else it was sufficiently high grade that it would have to be shipped.

The Court: Then it would mean that you were taking ore out of the ground and either shipping it or,—what, where would you ship it?

A. If it were sufficiently high grade it would be equivalent to a concentrate.

The Court: And if it were not?

A. You would have to concentrate it.

The Court: And where would that occur?

A. At the property. [162]

The Court: And that is what it means?

A. Yes.

The Court: And if you were mining gold, and told him you were mining gold, it would mean to him that you were getting gold good enough to ship to the mint or——

A. ——Or we would have to concentrate it.

The Court: Concentrating it in some manner or shipping it to a smelter?

A. Yes, sir.

The Court: And if you told him you were mining quicksilver, it would mean to him that you were getting it pure enough to sell as it is produced out of the ground——

A. ——No, in that instance, in the case of quicksilver I know of no deposits where they don't have—in the instance of a small deposit—I know

(Testimony of John Davis Bradley.)

of no instance where they wouldn't have a retort right there, and in case of a larger one a reduction works.

The Court: And if you told him you were mining quicksilver he would understand it, I take it, that you were taking it out of the ground and applying heat or some process to it there at the mine?

A. That's right.

The Court: I have another question to ask. [163] At the time this 1941 agreement was being formed was there any discussion by you with anyone representing the plaintiff, with respect to the tax question involved, such as depletion?

A. Yes.

Q. With whom was that discussed?

A. I think Mr. Worthwine discussed it, probably through me, with our tax attorney in San Francisco. I don't remember discussing it directly with Mr. Oberbillig.

The Court: That is all I have to inquire of this witness.

Mr. Ray: You may cross examine.

#### Cross Examination

Q. (By Mr. Casterlin): Mr. Bradley, you have testified concerning minerals. Now, tell us everything that has been produced out of that mine during the time you have had it.

A. Gold, antimony, tungsten, some quicksilver from the adjoining property which we originally had and then subsequently did not have.

(Testimony of John Davis Bradley.)

Q. Is that everything that has been produced out of those mines?

A. To the best of my recollection, that is correct.

Q. Did you mention antimony? A. Yes.

Q. Did you mention arsenic? [164] A. No.

Q. There was some arsenic produced?

A. Yes, but we didn't produce it in the common usage of the word, we were not aiming to produce arsenic, that was an impurity.

Q. Now, Mr. Bradley, if you meet a mining man or an ordinary prospector and, well, let's say you met a prospector and you asked him where his claim was located and he told you and you said "What are you producing up there?" would he name the minerals that he is producing?

A. Yes, I would expect him to.

Q. And if he had an antimony mine and you asked him what his mine was producing and he said antimony, you would understand it, wouldn't you? A. Yes.

Q. And he would understand you?

A. Well, I haven't said it.

Q. But you would understand each other if you talked to a prospector out here?

A. May I interject a point here?

Q. Yes.

A. That is, that silver should be added to the gold. Gold, silver, and antimony were the products.

Q. If you met a miner out here who was [165] going out to locate claims and you asked him where his claims were and he told you and you would

(Testimony of John Davis Bradley.)

say "What are you producing up there?", and if he told you that he was producing antimony, you would understand him, wouldn't you?

A. I would understand that he was producing antimony, but I would ask him how.

Q. You, you might ask him how, but if you said to him "What are you producing up there on that property" and he said "antimony", that would be an intelligible answer, wouldn't it?

A. Yes, in the common meaning, yes.

Q. And if he said he was producing gold, that would be intelligible?

A. In the common usage of the term you refer to the end metal although you are not producing the end metal.

Q. But you refer to the end product when you ask him what he is producing?      A. Yes.

Q. And he might not have, as is the usual custom, any smelter on his property at all?

A. Very likely not.

The Court: The usual custom is not to have a smelter?

Mr. Casterlin: Yes, we will stipulate to that.

A. I might very well ask when he said antimony, what mineral, and how much, how are you doing.

Q. And by minerals you would understand that that included everything in the mineral family, wouldn't it?

A. No, I wouldn't understand that, it would include just that mineral that he said.



(Testimony of John Davis Bradley.)

Q. When you would ask him what mineral you are producing?

A. No, I would say, "How does your antimony occur, in what minerals?"

Q. You might ask him that?

A. Yes, I think I would.

Q. Yes, but you would know that the mine was producing antimony when he said "That is what I am producing up there", you would understand that, wouldn't you?

A. No, I wouldn't understand completely whether he was producing antimony as ore or in concentrates.

Q. But you would understand that antimony was coming from the mine?

A. I would understand it was antimony, as we used it, although it might be the mineral stibnite that was being concentrated, that was the product that was receiving attention, yes.

The Court: Before you leave that, are you leaving that now, Mr. Casterlin?

Mr. Casterlin: Yes. [167]

The Court: What would it mean to you, you said that you would understand what he meant, what would you understand?

A. That the man told me that he was producing antimony.

The Court: That he was mining antimony, what would that import to you?

A. That he had an antimony property that was worth mining.

(Testimony of John Davis Bradley.)

The Court: Of course, it would mean that he was taking something out of the ground, would it import anything more than that?

A. If he was doing it on a large enough scale it would mean either that he had a high enough grade of ore or he had a concentrator on it.

The Court: A concentrator on the property?

A. Yes, if it was a large enough property and sufficiently low grade.

The Court: Or it might mean that he was shipping?

A. Yes, or he wouldn't be mining it very long.

The Court: Shipping it where, I mean to what kind of concern?

A. To a smelter.

Q. This is probably repetition, Mr. Bradley, but when did you say that Mr. Worthwine became connected with your company as its attorney? [168]

A. I didn't say specifically, but I think that he did special work for us, perhaps prior to 1941, but I said that he became recognized during the war years as our local counsel, particularly when Mr. Davis became involved in World War II.

Q. That would be prior to the erection of the Yellow Pine smelter?

A. That he was doing specific selected work for us, yes.

Q. Was he your attorney at the time the Yellow Pine smelter was put into operation?

A. He was acting on our behalf, yes.

Q. Can you pinpoint about when he became your

(Testimony of John Davis Bradley.)

representative or attorney with respect to this Stibnite property?

A. He became classified as local counsel but still subject, whenever convenient to working with John Davis by correspondence, perhaps in 1942. But I don't remember exactly.

Q. Now, Mr. Bradley, about the time that you started building the Yellow Pine smelter, did you have any conversation with Mr. Oberbillig concerning an amendment to this 1941 contract?

A. Yes.

Q. And was the 1941 contract ever amended as a result of that negotiation?           A. No.

Q. Now, that negotiation arose, did it not, over an argument concerning how you were to pay [169] royalty at the Yellow Pine smelter, isn't that true?

A. I wouldn't say that was exactly true, Mr. Casterlin, what I was striving to do in that instance was to arrive at some simple form that would preclude arguing. We had had a number of arguments in the past, and I felt that establishing a simple form rather than agreeing to smelter deductions as such, and having those up as a cause of complaint, that a simple form should be agreed to.

The Court: By a form what do you mean, a formula?

A. Yes, a formula, I would say a formula.

Q. Your minds never came to a meeting, you with Mr. Oberbillig on that point of a special formula, did it?           A. No.

(Testimony of John Davis Bradley.)

Q. So that this dispute which arose, or the argument which arose, before the Yellow Pine smelter was put in operation had to do with how you would account for the royalties from the Yellow Pine smelter, that is correct, isn't it?

A. It is incorrect from this standpoint, that there was never a dispute at that point. I was endeavoring to illustrate to Mr. Oberbillig a simple way of accounting for our smelter charges, and the fact that it was never accepted, it was never in what you call a dispute. My correspondence, which I think was the main way, completely the way, of conveying my ideas to Mr. Oberbillig, was [170] only in one instance answered and then never to the point. It never became an argument.

Q. There was a discussion between you and Mr. Oberbillig, let us put it that way, concerning the amendment to the 1941 contract?

A. No, it was one-sided. I was endeavoring to get Mr. Oberbillig to understand what I was trying to do and I don't think that I ever got my point across, I never received——

Mr. Brown: ——We object to that, your Honor, as improper cross examination. It doesn't go to any issue in this case and we did not question the witness in regard to that on the direct examination.

The Court: What is the purpose of this, Mr. Casterlin?

Mr. Casterlin: The purpose is this, the defendant has endeavored to show, by long questioning, that Mr. Oberbillig, representing the United Mer-



(Testimony of John Davis Bradley.)

cury, agreed to accept these settlements and accepted these settlement sheets without any question.

The Court: The objection is overruled.

Q. Now, your suggestion to Mr. Oberbillig was, as I understand it, that the contract of 1941 should be amended so as to provide some particular formula for determining the royalties to be paid upon the product of the Yellow Pine smelter? [171]

A. It was simpler than a formula. What we did was to suggest that in lieu of 5% that the royalty on smelted products be 2.75%, which was more than necessary, but we were leaning over backward on the end product of the smelter so as to preclude the necessity of constant haggling on what were properly chargeable and accountable smelting costs.

Q. And that formula, you determined, should be applied to the Yellow Pine smelter?

A. Correct.

Q. And Mr. Oberbillig never did come to any agreement with you on that, did he?

A. No, he never agreed to that.

Q. So that this misunderstanding, if we put it that way, which started prior to the construction of the Yellow Pine smelter, continued on through, and you had suggestions one way or the other?

A. No, that is incorrect. We offered in lieu thereof, the best terms of all of the contracts that we had ever shipped under as a guiding light, for that to run for a period of three years, at which time we had tested that procedure by making ship-



(Testimony of John Davis Bradley.)

ments to other smelters and to have a review. Now, somehow or rather, I was led to believe,—let me say, somehow I was of the opinion, I guess that isn't any different either, is it? Anyway, I [172] assumed that Mr. Oberbillig had acquiesced because I had no written argumentative proposal to that particular proposition that I recall.

Q. So that any of these suggestions that you made were never accepted by Mr. Oberbillig, were they?      A. I don't recall.

Q. Can you tell me, without any explanation?

A. No, never accepted except by never being rejected.

Q. Not being rejected?      A. Yes.

Q. And that is your personal opinion, isn't it?

A. I do know that that 2.75 reduction offended Mr. Oberbillig and therefore was rejected. I don't know that the other was rejected, and I didn't know at that time.

Q. Was it ever accepted?

A. Yes, in some period of time.

Q. Where did Mr. Oberbillig accept your suggested changes?

A. As evidenced by accepting the returns.

Q. Where did Mr. Oberbillig, or anyone in his behalf, tell you that your offer to reduce the 5% to 2.75% was accepted?

A. I just finished saying, Mr. Casterlin, that he did reject that, but he did not reject the other nor did he formally accept the other.

Q. He neither accepted nor rejected?

(Testimony of John Davis Bradley.)

A. But he did reject the 2.75, therefore, I felt [173] that the other was accepted and satisfactory.

Q. That was your interpretation of it?

A. Yes sir.

Q. And the result of your interpretation would be for your benefit, wouldn't it?

A. No, for Mr. Oberbillig's benefit.

Q. Weren't you trying, Mr. Bradley, to get some particular formula for the Yellow Pine smelter which would preclude Mr. Oberbillig's company from receiving 5% of the money that you received from the end product?

A. That never occurred to me.

Q. It never occurred to you?

A. No, all I was striving for was a simple way of arriving at the net smelter returns to our own smelter, so that there would be no room for argument.

Q. And this simple proposition that you made would allow you to deduct all the expenses of smelting, wouldn't it?

A. It should have, certainly.

Q. I am not asking you that, it would allow you to deduct all of the cost of smelting?

A. No, it would not have. The 2.75 was definitely in the United Mercury Mine's favor, and we proved that. Of all of the charges of smelting we would have borne more than our share so far as the royalty is concerned.

Q. Let's put it this way, Mr. Bradley, if you [174] had paid the United Mercury royalty on all

(Testimony of John Davis Bradley.)

of the money that you received from the end product from the Yellow Pine smelter the United would have received more money *that* you have paid them under your own formula, wouldn't they?

Mr. Ray: I think that was stipulated.

Q. I don't think so.

The Court: What do you mean by your own formula, the accepted formula?

Mr. Casterlin: The accepted formula, yes.

The Court: Do you mean, Mr. Casterlin, that the defendant, if they had not charged for smelting and had given a 5% royalty on whatever it received for the end product after smelting, that it would have paid more money to the Plaintiff than the 2.75, was that the figure?

A. 2.75, yes, which wasn't the formula used.

Mr. Casterlin: Yes, your Honor, that is what I mean.

A. May I repeat my answer because it needs qualification.

The Court: Yes, you may.

A. I said that I didn't think, however, I would have to check the record, and the reason for that is that much of the product that was produced at the smelter is still unsold. [175]

Q. I hand you what purports to be a letter under date of April 14, 1948, from you, John D. Bradley, the Executive Vice President, to John J. Oberbillig, President, which has been marked for identification as Exhibit 11.

The Court: This is Exhibit 11 for identification,

(Testimony of John Davis Bradley.)

is it not? According to my notes it is attached to the Oberbillig deposition, a copy, that is. Now, what you produce here is the original, it appears to be the original.

Mr. Casterlin: That's right, we will put that in, we will offer that as Exhibit Number 11.

The Court: What you are offering now appears as the original of the copy marked Exhibit 11 and attached to Mr. Oberbillig's deposition.

Mr. Casterlin: Yes.

The Court: Do you wish it marked as Exhibit 11?

Mr. Casterlin: Yes.

The Court: The clerk will so mark it and hand it to the witness.

Q. Mr. Bradley, I will ask you if that is your signature attached to that letter?

A. Yes, it is.

Mr. Casterlin: We now offer Exhibit Number 11.

The Court: Is there any objection? [176]

Mr. Ray: For what purpose is that offered?

Mr. Casterlin: For all purposes.

Mr. Brown: I think we have no objection except that we reserve the objection that it is not proper cross examination.

The Court: The objection is overruled and it is received in evidence as Exhibit 11.

[See pages 382-387.]

Q. I hand you, Mr. Witness, a letter dated December 2, 1948, purporting to be a letter from John D. Bradley, Executive Vice President, to Mr. J. J.



(Testimony of John Davis Bradley.)

Oberbillig, President, and it is marked for identification as Exhibit Number 31.

The Court: Has that been marked as Exhibit 31?

Mr. Casterlin: I have asked the Clerk to mark it.

Q. I ask you to state if that is your name attached to that exhibit?     A. Yes, it is.

Mr. Casterlin: I now offer Exhibit Number 31.

Mr. Brown: We have no objection except that we have the reservation that it is improper cross examination.

The Court: The objection is overruled and [177] it is received in evidence as Exhibit Number 31.

[See pages 436-440.]

Q. Mr. Witness, I hand you what has been marked as Exhibit Number 29, and admitted in evidence. Calling your attention to the second page of that exhibit and the first line "gross sales value per attached invoice, \$34,228.93", that item has reference to Page One of that exhibit?     A. Yes.

Q. Now, the second line, "less operating costs applicable, including depreciation, \$6,295.25". Was that the only report that you made to the United as to what constituted those deductions?

A. Yes, I believe that was all that was sent to the United describing the deductions.

Q. On Page Three?

A. I don't have a Page Three, Mr. Casterlin.

Q. Calling you attention to the contract of 1950, which is set forth at Page 59 of the transcript,—Page 69, pardon me, Mr. Bradley. The last paragraph which is Number 3, "Save and except for



(Testimony of John Davis Bradley.)

the above and foregoing postponement of royalties, the said conveyance and royalty agreement, in all its particulars and provisions shall remain in full force and effect." Would you say that the purpose of this 1950 contract was for the purpose expressed in it or for some other purpose?

A. The purpose, I have forgotten what is [178] expressed in it, but the purpose was to postpone the royalties for that period.

Q. And in other respects the original contract would not be amended or changed at all?

A. That's right.

Q. Calling your attention to Exhibit 5A,—strike that question, please,—calling your attention to the original contract, which is Exhibit Number 7, and which appears in the transcript at Page 17 and reads as follows: "By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals, or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho." Will you tell us who first proposed that language, whether it was you or Mr. Oberbillig?

A. I believe I did.

Q. So that definition came into the 1941 contract as it was proposed by you?

A. It was retained as proposed by me in the 1939 contract, and retained in the 1941 contract for obvious reasons.

Q. This probably is repetition. The Yellow Pine

(Testimony of John Davis Bradley.)

smelter was built by Bradley's as an economic movement, was it not?

A. It proved to be a very uneconomic movement.

Q. My question is, Mr. Bradley, the Yellow Pine smelter was [179] built by Bradley's as an economic project?

A. Yes, that was the intent at the time.

The Court: And that would mean to try and make more money.

Q. By that economic project you endeavored to get larger returns from your operation than you would have otherwise?

A. We endeavored to get some, we could see that with the grade of the ore we couldn't——

Mr. Casterlin: ——That answers the question, Mr. Bradley.

The Court: That is what they are in business for.

Mr. Casterlin: That was the purpose of my question.

The Court: Whenever a company stops trying to make money for its stockholders then, of course, the one in charge doesn't stay there very long.

Mr. Ray: I think, your Honor, that the witness started to explain his answer and we would like that in the record.

The Court: Unless the answer requires some explanation, and I don't see that it was, he wasn't asked the purpose in so many words.

Q. The United never had anything to say with

(Testimony of John Davis Bradley.)

respect to directing the operations at the mine, did it? [180]

A. It did in the early years but never once,—and that was one of the reasons that we switched to the gross royalty.

Q. Under the terms of the original contract you owned the mine?

A. Under the terms of the '41 contract.

Q. Yes?

A. You are referring now from then forward?

Q. Yes?

A. Yes, they had no right to interfere with the operation of the mine according to the terms of the contract of the sale.

Mr. Casterlin: That's all.

#### Redirect Examination

Mr. Ray: Before I interrogate the witness, I should like to ask counsel to produce the original of the letter dated March 31, 1948, which is referred to in Exhibit 11.

Mr. Casterlin: I think we will save a little time, if the Court please, if we may have a little time.

The Court: Very well, just go ahead.

Mr. Ray: I am sorry, your Honor, but I can't very well conduct my re-examination on these [181] letters very well until we have the other.

The Court: Now, the Exhibit is marked for identification as Defendant's Exhibit Number 32.

The Clerk: That is right.

Q. Now, Mr. Bradley, I understand you have

(Testimony of John Davis Bradley.)

in your possession a document which is marked as Defendant's Exhibit 32. Will you state what it is.

A. It is a letter from me.

Q. Signed by you?            A. Yes.

Q. And addressed to whom?

A. To Mr. Oberbillig, President, United Mercury Mines Company.

The Court: Was that letter produced from the files of the plaintiff?

Mr. Ray: Just produced from the files of the plaintiff.

Q. Now, will you refer to Exhibit Number 11, and near the bottom of the page, in reference to a letter of March 31, do you see that?

A. Yes, I do.

Q. Can you state whether Exhibit 32 is the letter referred to in Exhibit 11?            A. Yes. [182]

Q. Mr. Bradley, you have been interrogated on cross examination, with respect to a proposal which involved the figure 2.75, do you remember that?

A. Yes.

Q. And do you have in mind also that the royalty figure in Exhibit 7 is 5%?            A. Yes.

Q. And you submitted the figure 2.75 to Mr. Oberbillig, did you not?            A. Yes, I did.

Q. And he thought, as he told you, that was a reduction of the 5% royalty?            A. Yes, he did.

Mr. Casterlin: Just a moment. I don't like to object to the question as leading and suggestive, but I do think the witness should testify.

Q. What was your purpose in preparing—



(Testimony of John Davis Bradley.)

The Court: —The objection to that last question is overruled and the answer may stand.

Mr. Ray: May I withdraw that portion of the question I just started?

The Court: You may.

Q. What did you intend the 2.75 to mean?

A. I meant——

Mr. Casterlin: —I object to that at this [183] time as calling for an interpretation, apparently, of an Exhibit which has not been admitted in evidence.

Mr. Ray: You asked, Mr. Casterlin, if he wasn't trying to get the royalty amended or reduced.

Mr. Casterlin: If that is the question, I have no objection to it.

Mr. Ray: And by the way, I would like to offer Exhibit Number 32 at this time.

The Court: Is there any objection?

Mr. Casterlin: No objection.

The Court: It will be admitted.

[See pages 440-446.]

Mr. Ray: Except as to the question asked on cross examination which went to Mr. Bradley's purpose and motive, I would simply read the letter to show what they are and were, but since the motive was gone into and inquired about on cross examination I want to ask what the purpose was in proposing this 2.75?

A. My purpose in proposing that——

The Court: —Was that a question, Mr. Ray?

Mr. Ray: If I may have that as a question.



(Testimony of John Davis Bradley.)

A. My purpose in proposing that was for that royalty rate to be in lieu of the 5%, and then——

Q. 5% of what? [184]

A. 5% on the net smelter returns, in which case we felt that we might be involved or that it might become a difficult point in explaining to United Mercury what the smelting charges were. So, in lieu thereof, and in order to simplify the accountability of the royalty I proposed 2.75, which was far and away ahead of the 5% of the net smelter.

Q. Let me see if I can get at it this way,—you construed 5% as the net royalty applicable to net smelter returns?      A. Yes.

Q. Were you now looking for a percentage which would yield equivalent or approximately the same if applied to the end product of the smelter?

A. That is correct, and as I have tried to point out, and pointed out in those letters, it was on the United Mercury's side of the ledger so far as favorability was concerned.

Q. Why is that?

A. Now I wonder. I was trying to be overly fair.

Q. In other words, was it your opinion that 2.75% on the products after they had gone through the smelter would be more than 5% on the net smelter returns?

A. Yes, and that can be more than confirmed by checking the record.

Q. Mr. Bradley, you were asked who first proposed the introduction into this agreement of the

(Testimony of John Davis Bradley.)

net revenue provision, and you stated that you did, to whom did you propose it?

A. To Mr. Worthwine. [185]

Q. Where and when?

A. In his office in Boise at the time, during the period of negotiation of the 1939 contract.

Q. Explain to the Court what occurred at that time in that conference between you and Mr. Worthwine, when you first proposed the inclusion of the net revenue clause into the agreement?

Mr. Casterlin: We object to this until it is determined in what capacity Mr. Worthwine was acting, because it appears now that Mr. Worthwine was representing Mr. Oberbillig, and also it appears that Mr. Worthwine was representing, in special matters, Bradley, at the time of the '41 contract.

Mr. Ray: I would like to ask counsel if there is any dispute that Mr. Worthwine was representing the Plaintiff in the negotiations of the 1939 contract or the 1941 or the 1950? I would like to ask if there is any dispute about that?

Mr. Casterlin: There is a dispute with reference to the '41 contract, because the testimony here is that——

The Court: ——The question deals with the 1939 contract. The objection is overruled. He may answer the question.

Q. Who was Mr. Worthwine representing?

The Court: There was a question unanswered.

A. Yes, there was a pending question.

(Testimony of John Davis Bradley.)

Q. I thought it was answered,—go ahead, Mr. Bradley.

A. The reason being that we had other mineral products that were not covered by net mint and net smelter clauses. Mr. Worthwine, presumably after consultation with Mr. Oberbillig, presented net milling returns——

Mr. Casterlin: ——I want to object——

Mr. Ray: Let's strike out the word "presumably". You assumed that, did you, Mr. Bradley?

A. I was presented this draft by Mr. Worthwine.

The Court: By this draft, you refer to what?

A. Exhibit 5A, which showed in addition to net mint and net smelter, a clause to cover the other mineral products of which we had evidence and possible indications as to the future. Mr. Worthwine phrased it under the caption "net milling", which to me was not as broad as "net revenue", owing to the reason that the word milling, for example, would perhaps not cover the actual mercury processing. You might have high grade ore that wouldn't be milled.

Q. No, just a minute,—have you encountered mercury in its free state? [187]

A. Yes, I have.

Q. And when encountered in its free state is it sold directly as it is taken from the earth?

A. If it can be captured.

Q. Go ahead.

A. That concludes my reply.

(Testimony of John Davis Bradley.)

Q. Did you have before you at that time for that discussion, the document that has been identified as Exhibit 5A?      A. Yes, I did.

Q. Did you at that time make the notations in your handwriting that you have heretofore discussed?

A. I made a number of notations——

Mr. Casterlin: ——We object to that as being incompetent, irrelevant and immaterial in view of the witness' testimony.

Mr. Ray: I will re-offer Exhibit 5A.

The Court: But your question is hardly intelligible considered in the light of the fact that the other evidence is at present excluded from the record.

Mr. Ray: That's right, I should keep that in mind. I am now, your Honor, re-offering Exhibit 5A.

The Court: I suggest that you reframe the pending question. [188]

Mr. Ray: I will withdraw that question.

Q. At the time you had this discussion with Mr. Worthwine and at the time that the net revenue clause was first proposed, did you have before you a draft of the contract submitted to you by Mr. Worthwine?

Mr. Casterlin: We object to that until we know what contract he has in mind that was submitted to him.

Q. Did you have a preliminary draft of the '39 contract?



(Testimony of John Davis Bradley.)

which states the net revenue clause and the word [191] "normal" as a limitation upon the smelter deduction?

A. Only the added words under net smelter returns, and certain minor corrections.

Mr. Ray: I think Mr. Casterlin stipulated that at the time this contract was negotiated Mr. Worthwine was representing the Plaintiff.

The Court: You mean the 1939 contract?

Mr. Ray: Yes.

Mr. Casterlin: The 1939, yes, but this amendment is for use in the '41 contract.

Q. Mr. Bradley, you also negotiated the 1941 contract with Mr. Worthwine, didn't you?

A. Yes.

Q. Who was he representing in that negotiation?

A. The United Mercury Mines Company.

Q. Who represented the Bradley Mining Company?      A. John Parks Davis.

Q. Were you in the negotiations?

A. Yes, I did the negotiating and so far as the legal side of it was concerned I submitted it to Mr. Davis for his approval.

Q. Mr. Worthwine was not representing you in those negotiations?      A. No. [192]

Mr. Ray: I don't think we have anything further with this witness.

The Court: We will start with the Recross at two o'clock.



(Testimony of John Davis Bradley.)

March 20, 1957

2:00 O'Clock P.M.

The Court: You may proceed.

Mr. Casterlin: No Recross.

Mr. Ray: At this time, if the Court please, we ask the Court for an Order making a part of the evidence the testimony which went in as excluded evidence, the testimony which went in in connection with Exhibit 5A.

Mr. Casterlin: We object to that on the ground that all of the evidence is not competent, relevant, or material in view of the limitation of the cross examination of this defendant on particular matters.

The Court: The objection is sustained. The motion places such a burden on the Court to remember everything that was asked of and answered by the defendant concerning Exhibit 5A under the evidence which was excluded. It seems to me that you would have a better record if you proceed to ask the questions which you think you would like to have answered. [193]

Q. (By Mr. Ray): At the time, Mr. Bradley, that you and Mr. Worthwine discussed the deletion of the milling clause and the substitution of the net revenue clause, did you explain to Mr. Worthwine why you suggested the substitution for the milling clause, and what material the net revenue clause might relate to?

Mr. Casterlin: To which we object on the ground that Mr. Worthwine is a third party to the con-

(Testimony of John Davis Bradley.)

tract and he might have been acting with respect to his own interest and not with respect to the interest of the United Mercury, and further that it is incompetent and irrelevant to any of the issues in this case, and invades the province of the Court in view of the fact that it is a self-serving declaration and not a meeting of the minds of the parties.

Mr. Ray: I want to point out that Mr. Worthwine was not a participating party to the contract.

The Court: I don't have any problem with the fact that he was representing, in addition to himself, at that time——

Mr. Ray: ——He wasn't representing himself at that time.

The Court: He had an interest in the contract [194] no doubt, but the problem that I have is whether or not that portion was opened up by the cross examination.

Mr. Ray: He was asked if he proposed the introduction of that contract,—that clause, and he said he did, and I am asking, at the time he introduced it, what was said.

Mr. Casterlin: The question, I think, was who first proposed the definition of the net revenue clause.

The Court: I believe the purpose in asking that was to show that the authorship was in the defendant and therefore, you would argue, that the clause must be construed most strongly——

(Testimony of John Davis Bradley.)

Mr. Casterlin: —That's correct, that was the purpose of it.

The Court: Here we cut across much of the negotiation problem,—the negotiations were merged in the written document, the language is there, and the whole issue here is, what is the content of the language? What is the purpose of this?

Mr. Ray: The purpose is that we want to take ourselves back and put ourselves in the surroundings under which the defendant introduced that, and we think we are entitled to show the circumstances under which it was introduced. He [195] suggested the substitution of one provision for another.

The Court: Yes.

Mr. Ray: Why did he do it?

Mr. Casterlin: We take the position that it is immaterial why he did it until it is shown that there is some uncertainty or ambiguity in the language or that it has a peculiar meaning which was not understood, in the ordinary sense of the words, by the parties to the contract.

The Court: I will sustain the objection. If it is not in the record of excluded evidence, you may place it there. Are you content that the answer called for by the last question is in the record of excluded evidence?

Mr. Ray: Yes.

Mr. Brown: If your Honor please, yesterday the defendant tendered the Pretrial Conference

(Testimony of John Davis Bradley.)

Order in evidence. We do not have the number of the exhibit.

The Court: Exhibit 30, according to my notes.

Mr. Brown: However, the Exhibit contains a number of stipulations which at the moment, on the basis of the Order itself, the Plaintiff has reserved objection to certain of the stipulations and [196] then reserves one specific objection on the ground of relevancy and materiality—

The Court: I understand those objections were not urged when the document was offered.

Mr. Brown: We understand that too, but we are wondering whether we were in rather a blind alley so far whether they were overruled or whether the stipulations stand actually as admitted.

The Court: The objections were reserved and were not urged at the trial, that is the way the record stands now as I understand it.

Mr. Brown: We just wanted to be sure of that.

The Court: Is that your understanding, Mr. Casterlin?

Mr. Casterlin: Yes, they were reserved.

The Court: And were not again urged when the document was offered?

Mr. Casterlin: They are still reserved.

The Court: Very well, if you feel they are still reserved, they are overruled.

Mr. Ray: We have no further questions of Mr. Bradley. [197]

Mr. Casterlin: No further questions.



Mr. Ray: We have no further witnesses.

The Court: Does the Defendant rest?

Mr. Ray: The Defendant rests.

The Court: Any rebuttal?

Mr. Casterlin: None, the Plaintiff rests.

The Court: Would you gentlemen like to take up oral arguments this afternoon?

(Remarks of Court and Counsel concerning time of arguments not transcribed.)

Mr. Casterlin: May I inquire as to whether there will be briefs after the oral argument?

The Court: Well, I hope not, I hope it will not be necessary to have briefs, if I can be clear enough that will not be necessary. I presume that this litigation isn't getting any better with age. I propose, if I am clear enough on the matter, I will decide it at the conclusion of your oral argument. As I see it now, if the Defendant is entitled to deduct the smelting charge as to the matter in controversy, then the Judgment should go to the Defendant. If the Defendant is not entitled [198] to recover the smelting charges, then Judgment should go to the Plaintiff. I don't know how much is at stake here, probably a great deal, but that is immaterial.

Mr. Casterlin: That is just what I had in mind and was hoping would result from our little conversation, that the Court would indicate the points that he would like to hear us on.

The Court: Are you agreed that is the situation, fairly stated, that is, if the smelting charges are



properly deducted then Judgment must go to the Defendant, and if they are not properly deducted then Judgment should go to the Plaintiff?

Mr. Casterlin: In other words, if the net smelter return provision applies then Judgment is for the Defendant.

The Court: By that you mean if the net smelter returns provision applies to the ores smelted at the Yellow Pine?

Mr. Casterlin: Yes.

The Court: Then Judgment would go to the Plaintiff.

Mr. Ray: To the Defendant.

The Court: That's right, I am sorry. [199]

Mr. Casterlin: And if the net revenue provision applies then Judgment goes to the Plaintiff with the provision for accounting.

The Court: Yes, an accounting would be necessary I presume.

Mr. Casterlin: That simmers it down pretty well, and I think with that limitation we surely can get through in an hour on a side.

The Court: You may take whatever time you feel is necessary, say, up to an hour and a half on a side.

You don't know, I presume, what is in controversy. It is more than the question of smelter charges.

Mr. Casterlin: Yes.

The Court: What is in controversy is whatever the defendant may receive upon the royalty——

Mr. Casterlin: —If the net revenue clause prevails we are not interested in smelter charges.

The Court: You are only interested in the returns that the Defendant receives.

Mr. Casterlin: If the net smelter returns provision applies we are still not interested in an accounting, because it is admitted that they have [200] properly accounted for everything under their theory of the net smelter returns.

The Court: An accounting would be necessary to know what is at stake then?

Mr. Ray: There is an Exhibit in the files somewhere, I have forgotten now just where it is, where in response to an interrogatory there is a tabulation showing what we sold, what the products were that were sold, and what we received for them.

Mr. Casterlin: And on which the 5% was not paid.

Mr. Ray: That is right.

The Court: I don't need to say to you gentlemen, able lawyers that you are, you know what the amount is which is involved here, and someone is going to be hurt by this Judgment tomorrow, if I am able to render a Judgment tomorrow, and if you have any disposition to settle the matter, probably this is the last chance. Is there anything further, gentlemen?

Mr. Casterlin: Nothing from us.

Mr. Ray: Nothing further.

The Court: Then Court will be adjourned until tomorrow morning at 10:00 o'clock. [201]

March 21, 1957

10:00 O'Clock A.M.

(Arguments of Counsel.) [202]

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The Court: The contract is admitted and the salient features that we are involved with are, of course, as set forth on pages 15 to 18 of the record on appeal, which is excerpted from Exhibit Seven here.

We bear in mind that the contract was made in 1941 and the smelter built in 1949. Our problem here is to ascertain the intention of the parties as manifested by the writing when read in the light of the facts and circumstances in evidence surrounding execution. The controversy arises, of course, because the contract is unclear as applies to this subsequently constructed smelter operation on the property, although admittedly the contract contemplated the possibility. It did not literally in so many words cover the contingency of the smelter on the property owned and operated by one of the parties to the contract.

It is stipulated, of course, at Q on Page six of the Pretrial Conference Order: "That, if under the terms of the contract, defendant, Bradley Mining [203] Company, is entitled to make any charge or deduction for smelting ores in the Yellow Pine Smelter, the charges and deductions so made by Bradley Mining Company have been proper charges and deductions, and all settlements made with the plaintiff have been correct."

"If it is ultimately determined that the net smelter returns provisions of the agreement is applicable to the operations of the Yellow Pine Smelter for ores, concentrates, metals and values taken from the claims described in the agreement, then the settlement made by Bradley have been correct as to the minerals, ores, metals and value processed at the smelter."

"That there is no dispute as to the meaning and interpretation of the net mint return clause of the contract." That appears under R, at the top of page seven of the Pretrial Conference Order.

I find that this contract was made by experienced mining people, including the principal draftsman,—I say principal, at least it appears in the record to be a fair inference that Mr. Worthwine was the principal draftsman, and a party interested in the contract, and the performance of it as it turned out, so I find that the parties contracted with reference to the practices and customs in the mining [204] industry prevailing at that time and as they envisioned such might be over the years. I think one significant fact that we may be inclined to forget at times, and one that should be kept constantly in mind, these parties envisioned this arrangement to last for ten centuries. That is a bold undertaking. I would hate to be called upon to envision what may be going on in the mining industry in the year 2000, much less the year 2900 and something, nine centuries later, but it is admitted under S, at Page seven of the Pretrial Conference Order: "That before 1939 and thereafter at all times material to this



action, it was the practice and custom in the smelting industry for companies who own and operate smelters to also own and operate mines; that it was likewise the practice and custom in the industry for companies owning mines and also mining smelters to ship their mine produce to their own smelters; that it was likewise the practice and custom with respect to owners of smelters and mines, to also lease mining properties from other independent owners, and send the produce extracted therefrom to their own smelters and to settle for the product so shipped on the same basis as such smelting companies would settle with independent or custom shippers; that it was a practice [205] and custom of the trade that where the ores treated came from mines owned by the owners of smelters, or came from mines leased and mined by the smelter owner or came from independent custom shippers, that the smelting charge and the cost of transportation of concentrates to the smelter were deducted to arrive at a net amount commonly referred to in the mining and smelting industries as net smelter returns."

Under T on Page seven it is stipulated: "That it is a matter of common knowledge and historically recognized in the mining industry that the milling of ores to reduce such ores to a concentrate form is a part of the mining process, and that the smelting of ores is not a part of the mining process."

There has been evidence of other customs and practices in the mining industry, that evidence stands uncontradicted. The other surrounding facts and circumstances siding in the interpretation are



the 1939 agreement, Exhibit 5, and the provisions of that agreement, and it is uncontradicted that one of the purposes of the 1941 agreement was to reduce the amount of royalty required to be paid by the defendant, and, as it has been developed here in our discussions today, the defendant's purpose to get a reduction in royalty, for obvious economic reasons [206] the plaintiff was moved to grant it because the plaintiff's purpose thereby was to induce defendant to a more intensive mining of the ores, particularly the low-grade ores on the property, or which might thereafter be found on the property. Having in mind again that this five percent arrangement was to last for a thousand years and even longer if paying values were found. As I have said before, it is uncontradicted that the possibility that the defendant might build a smelter at the site of the mine was discussed during the negotiations of the 1941 contract, and it is admitted under P of the Pretrial Conference Order at Page six: "That at the time of the execution of the contract, December 31, 1941, there were no smelters located at Cascade, Idaho." The contract itself, as was developed this morning envisages the possibility of a smelter near the mine and it was conceded in argument that that referred to the possibility that the defendant itself might build a smelter at or near the mining property. The provision in question appears at Page 18 of the Transcript of the record, and reads: "Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be de-

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ducted from the net smelter or reduction returns, a fair charge for trucking [207] from the mine to such smelter or reduction works.”

I have already referred to the custom and practice with respect to the operation of smelters. The parties contracted in the light of that practice. There is uncontradicted evidence that tax problems were discussed during the negotiation of the 1941 agreement, including the problem of depletion, and it seems a fair inference that the parties did contract with respect to these tax problems existing and possibly contemplated for the future end, of course, it will be assumed that they contracted with reference to existing laws. The Internal Revenue Code of 1939 at that time, specifically Section 114 (b) (4) (B) made provision for depletion allowances computed upon gross income from the property to mean the gross income from mining. The Statute defined the term “mining”, “to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied [208] thereto”, and then the statute proceeds and defines the ordinary treatment processes incident to mines, and states: “The term ‘ordinary treatment processes’, as used herein, shall include the following”,



in the case of many minerals, including gold and silver, "which are not customarily sold in the form of crude mineral products,—crushing, grinding and beneficiation by concentration, such as gravity, flotation, amalgamation, electrostatic, or magnetic, cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining)", and continuing "or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores." The statute thus attempts to define the ordinary treatment processes normally applied by mine owners in order to obtain a commercially marketable mineral product. Of course, when that product is obtained, that is the point at which the computation must begin for the purposes of depletion, or to put it another way, in computing the gross income from mining an operator may not proceed beyond these ordinary treatment processes, or he may not count the [209] income,—beyond the ordinary treatment processes normally applied in order to obtain a commercially marketable product. Thus, in the case of *Helvering v. The Bankline Oil Company*, 303 U.S., Page 262, that was a case in which the Court refused to allow the depletion based on the sale of the end product because that included some refining processes beyond the ordinary treatment processes normally applied.

In addition to the surrounding circumstances



there is certain conduct of the parties subsequent to the 1941 agreement, which throws light upon the intention of the parties, and that is this question of the tungsten ore, the uncontradicted evidence is that the tungsten ore was subjected to a flotation process at the mine, and it is interesting to note that the flotation process is included among the ordinary treatment processes by the mine owners in the statute that I just referred to of the Internal Revenue Code. These concentrates resulting were sold in the eastern market direct from the mine, reports were made, and royalty paid accordingly under the net revenue clause. Then there were certain tungsten concentrates that were sent to the defendant's Boise purification plant, and with respect to those, the net smelter return method of computing royalty was [210] used. Then there is the question of recitals in the 1950 modification agreement, Exhibit Number 6, which appears at Page 69 of the record transcript, in more particular the recitals with respect to May, 1950, royalty, which the uncontradicted evidence shows were computed according to the net smelter returns method.

I find that the parties, having in mind that this agreement was to last for such an unusually long period of time, that they envisioned, not only the possible method of marketing the mine product from the property, but also the possible variety of the minerals which possibly would be produced and marketed in the future, including gold, silver, antimony, tungsten, quicksilver and so forth, and as I read the provisions in question and particularly the

provision commencing at Page 15 of the Transcript of the record, Exhibit Number 7, the 1941 Agreement, we first find that there is a five percent royalty promise on all net smelter returns, net revenue, and net mint returns, as defined herein; and then over on Page 17 we find that net smelter returns are defined, net revenue is defined, and net mint returns defined. Then, reading on through the provision with respect to transportation, we find that the parties refer to the three methods, I shall call them, handling returns. Referring [211] to those methods as net smelter, market or mint returns. Smelter, market or mint,—net smelter, market and mint returns, smelter, market or mint, to which the same are trucked and so forth. The emphasis upon market is persuasive in the light of all of the other circumstances, that the parties have in mind here possible marketing methods, envisioning the possibility over the years, so they, as to anything marketable, in a condition to be marketed, the mint,—at the time they contracted the mint was the market. As to anything required to go to the smelter, the smelter was the market. As to other matters, as to concentrates, ores, metals or values, the net revenue provision was intended as a catch-all,—another method of marketing direct from the property. In other words, by transporting the product directly from the mine to the mint whenever the quality would permit such a relatively simple operation; by sending it to the smelter to be processed in the customary way, and in the third place, by marketing ore concentrates and values direct to third per-

sons from the mine, after the mining process had been completed. This evidence of custom and practice and other surrounding circumstances and subsequent conduct is not contradicted, nor is it otherwise illumined by any testimony from [212] either Mr. Worthwine or Mr. Oberbillig.

It is my view that the Plaintiff's construction would read the net smelter returns provision out of the contract, since the net revenue clause is general and covers everything not otherwise covered. If the net revenue clause is not the general catch-all then there is no explanation for having the mint and the smelter returns clauses in the contract, they are specific and appear to limit or control the general,—by the net revenue is meant the amount paid by the purchaser from the sale of concentrate, any purchaser. It is broad enough, as pointed out this morning, to cover whatever is covered by the net mint returns and whatever is covered by the net smelter returns. In any event, the plaintiff's construction would read out of the net smelter returns clause the phrase, it being understood that the smelter will deduct its normal smelting charge and charges for railroad, freight, and so forth,—it wouldn't read out the freight provision, of course, but it would read out the smelting charge provision, or it would necessarily read into the clause the words 'third-party owned smelter', or as has been said here, 'outside smelter', or something of like effect. If the smelter was not owned by one of the parties to the [213] contract then it had to be a third-party owned smelter.

At this juncture it might be helpful to observe again that it was agreed that the parties contemplated that the defendant might erect a smelter, and it is said, and I so find, that in that contemplation they inserted in the contract, and it appears on Page 10 of the Transcript record: "Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking" and so forth. One of the most compelling purposes or one of the most compelling considerations, as I find it in interpreting this contract, is the purpose the parties had in setting or putting aside this 1939 agreement, and creating the 1941 agreement. It is admitted that the purpose of the defendant, of course, was to get the lower royalties, but important here is the purpose of the plaintiff in granting the lower royalties, and that purpose was to induce and make it economically feasible and attractive for the defendant to mine ores of a lower quality. It's admitted here that the construction of this contract, which would not permit the defendant to deduct the smelting charges, would result in substantial increase in the [214] amount of the royalty over that that would be payable were the net smelter return provision to apply whenever ore is smelted. That in itself, as I view it and find, would be a construction contrary to the purpose of the contract and contrary to the plaintiff's own avowed purpose at the time the contract was executed.



Accordingly, I find that the plaintiff is entitled to a declaratory judgment, but not as prayed for.

The judgment will be, declaring and decreeing that the proper legal method for determining the amount of royalty due United from Bradley under the terms of the 1941 contract for the minerals, ores, metals and values extracted or produced from the mining claims described in the agreement and conveyed to Bradley and smelted at the Yellow Pine smelter, owned by Bradley, is by the use of the net smelter return provision as defined in the agreement. I am referring now to the interpretation of the prayer of the Complaint as set forth at the bottom of Page 1 and the top of Page 2 of the Pretrial Conference Order.

Plaintiff is entitled to a judgment declaring it is the duty, under the contract, of Bradley to furnish the United the amounts paid by purchasers from the sale of minerals, ores, metals and values [215] extracted from said mining claims, and smelted at the Yellow Pine smelter, and the marketing costs and shipping costs from Cascade, Idaho.

The Plaintiff is entitled to further declaration that under the provisions of the agreement,—appearing at the bottom of page 16 of the transcript, to which we have been referring here,—. It is the duty of Bradley to furnish United all necessary information that United may require to assure it that it is receiving the royalty to which it is entitled under the terms of the agreement, and, of course, the right to inspect, examine, and make copies of the books and records of Bradley and sup-



porting data at least every six months, so as to enable United to satisfy itself that it is receiving its proper royalties.

There is no necessity under this view of the agreement to require an accounting and that will not be required.

The Court will rule that each party bears its own costs, and the Findings of Fact and Conclusions of Law and Declaratory Judgment will be prepared by counsel for the defendant. [216]

\* \* \* \* \*

[Endorsed]: Filed July 16, 1957.

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DEFENDANT'S EXHIBIT No. 4

[Rejected]

AGREEMENT

This Agreement, Made and entered into this 3rd day of October, 1930, by and between the United Mercury Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, as party of the first part, and the Yellow Pine Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business in the State of Idaho, as party of the second part, Witnesseth:

That Whereas, The said United Mercury Mines Company, a corporation, is the owner (except as against the paramount title of the United States) of three groups of lode and placer mining claims situated in the Yellow Pine Mining District, Valley County, State of Idaho, commonly called the Cinna-

Defendant's Exhibit No. 4—(Continued)  
bar Group, the Meadow Creek Group and the Antimony Group, comprising lode and placer mining claims, and comprising the following named mining claims, the notices of location of which are of record in the office of the County Recorder of Valley County, State of Idaho, at the book and page as herein stated, to wit:

Description of Claims

Cinnabar Group

Flyer: Amended, Book 6, Quartz, Page 75.

Emerald No. 1: Original, Book 3, Quartz, Page 396.

Emerald No. 2: Original, Book 3, Quartz, Page 398.

North Star Fraction: Original, Book 3, Quartz, Page 614.

Hard Climb No. 1: Amended, Book 6, Quartz, Page 87.

Hard Climb No. 2: Amended, Book 6, Quartz, Page 88.

Hard Climb No. 3: Amended, Book 6, Quartz, Page 89.

Hard Climb No. 4: Amended, Book 6, Quartz, Page 90.

Mountain Ridge No. 1: Amended, Book 6, Quartz, Page 77.

Mountain Ridge No. 2: Amended, Book 6, Quartz, Page 78.

Mountain Ridge No. 3: Amended, Book 6, Quartz, Page 79.

## Defendant's Exhibit No. 4—(Continued)

Mountain Ridge No. 4: Amended, Book 6, Quartz,  
Page 80.

Midnight No. 1: Amended, Book 6, Quartz,  
Page 98.

Midnight No. 2: Amended, Book 6, Quartz,  
Page 99.

Smith Extension No. 1: Amended, Book 6,  
Quartz, Page 81.

Smith Extension No. 2: Amended, Book 6,  
Quartz, Page 82.

Smith Extension No. 3: Amended, Book 6,  
Quartz, Page 83.

Smith Extension No. 4: Amended, Book 6,  
Quartz, Page 84.

Smith Extension No. 5: Amended, Book 6,  
Quartz, Page 85.

Smith Extension No. 6: Amended, Book 6,  
Quartz, Page 86.

Hermes: Patented, Book 4, Quartz, Page 194.

Pretty Maid: Patented, Book 4, Quartz, Page 195.

Annie Sell, Patented, Book 4, Quartz, Page 188.

Vermillion: Patented, Book 4, Quartz, Page 192.

Golden Gate No. 4: Patented, Book 4, Quartz,  
Page 191.

Vermillion Extension No. 1: Patented, Book 4,  
Quartz, Page 190.

Gold King: Amended, Book 6, Quartz, Page .

Gold King No. 1: Amended, Book 6, Quartz,  
Page 96.

Gold King No. 2: Amended, Book 6, Quartz,  
Page 97.

Defendant's Exhibit No. 4—(Continued)

Gold King No. 3: Amended, Book 6, Quartz, Page 100.

Monumental No. 1: Amended, Book 6, Quartz, Page 71.

Monumental No. 2: Amended, Book 6, Quartz, Page 70.

Monumental No. 3: Original, Book 3, Quartz, Page 516.

Monumental No. 4: Original, Book 3, Quartz, Page 512.

Monumental No. 5: Original, Book 3, Quartz, Page 511.

Monumental No. 6: Original, Book 3, Quartz, Page 509.

Monumental No. 7: Original, Book 3, Quartz, Page 600.

West Side No. 1: Amended, Book 6, Quartz, Page 94.

West Side No. 2: Amended, Book 6, Quartz, Page 95.

Golden Gate No. 1: Amended, Book 6, Quartz, Page 73.

Golden Gate No. 2: Original, Book 3, Quartz, Page 475.

Golden Gate No. 3: Original, Book 3, Quartz, Page 474.

El Rey: Amended, Book 6, Quartz, Page 104.

Quicksilver Queen No. 1: Original, Book 3, Quartz, Page 578.

Quicksilver Queen No. 2: Original, Book 3, Quartz, Page 577.



Defendant's Exhibit No. 4—(Continued)

First National No. 1: Amended, Book 6, Quartz,  
Page 74.

Liberty: Amended, Book 6, Quartz, Page 101.

Liberty No. 1: Amended, Book 6, Quartz, Page  
102.

U. S. A.: Amended, Book 6, Quartz, Page 76.

High Rock No. 1: Amended, Book 6, Quartz,  
Page 53.

High Rock No. 2: Amended, Book 6, Quartz,  
Page 54.

High Rock No. 3: Amended, Book 6, Quartz,  
Page 55.

High Rock No. 4: Amended, Book 6, Quartz,  
Page 56.

High Rock No. 5: Amended, Book 6, Quartz,  
Page 57.

Victor No. 1: Original, Book 3, Quartz, Page 453.

Victor No. 2: Original, Book 3, Quartz, Page 455.

Victor No. 3: Original, Book 3, Quartz, Page 456.

Victor No. 4: Original, Book 3, Quartz, Page 458.

Victor No. 5: Original, Book 3, Quartz, Page 459.

Monumental Quicksilver: Amended, Book 6,  
Quartz, Page 72.

Mountain Chief No. 1: Amended, Book 6, Quartz,  
Page 58.

Mountain Chief No. 2: Amended, Book 6, Quartz,  
Page 59.

Mountain Chief No. 3: Amended, Book 6, Quartz,  
Page 60.

Mountain Chief No. 4: Amended, Book 6, Quartz,  
Page 61.



Defendant's Exhibit No. 4—(Continued)

Mountain Chief No. 5: Amended, Book 6, Quartz, Page 62.

Mountain Chief No. 6: Amended, Book 6, Quartz, Page 63.

Mountain Chief No. 7: Amended, Book 6, Quartz, Page 64.

White Metal: Amended, Book 6, Quartz, Page 46.

White Metal No. 1: Amended, Book 6, Quartz, Page 47.

White Metal No. 2: Amended, Book 6, Quartz, Page 48.

White Metal No. 3: Amended, Book 6, Quartz, Page 49.

White Metal No. 4: Amended, Book 6, Quartz, Page 50.

White Metal No. 5: Amended, Book 6, Quartz, Page 51.

White Metal No. 6: Amended, Book 6, Quartz, Page 52.

Mountain Bell: Original, Book 3, Quartz, Page 325.

Mountain Bell Fraction: Original, Book 3, Quartz, Page 468.

Mountain Bell No. 1: Original, Book 3, Quartz, Page 470.

Vermillion Extension No. 2: Amended, Book 6, Quartz, Page 91.

Vermillion Extension No. 3: Amended, Book 6, Quartz, Page 92.

Vermillion Extension No. 4: Amended, Book 6, Quartz, Page 93.

## Defendant's Exhibit No. 4—(Continued)

West End: Amended, Book 6, Quartz, Page 103.  
Friends No. 1: Original, Book 5, Quartz, Page 75.  
Friends No. 2: Original, Book 5, Quartz, Page 69.  
Friends No. 3: Original, Book 5, Quartz, Page 74.  
Friends No. 4: Original, Book 5, Quartz, Page 68.  
North Star No. 1: Amended, Book 6, Quartz,  
Page 65.

North Star No. 2: Amended, Book 6, Quartz,  
Page 66.

North Star No. 3: Amended, Book 6, Quartz,  
Page 67.

North Star No. 4: Amended, Book 6, Quartz,  
Page 68.

North Star No. 5: Amended, Book 6, Quartz,  
Page 69.

White Mountain: Original, Book 5, Quartz, Page  
402.

Pat No. 1: Original, Book 4, Quartz, Page 435.  
Pat No. 2: Original, Book 4, Quartz, Page 437.  
Pat No. 3: Original, Book 4, Quartz, Page 441.  
Pat No. 4: Original, Book 4, Quartz, Page 443.  
Pat No. 5: Original, Book 4, Quartz, Page 439.  
Pat No. 6: Original, Book 4, Quartz, Page 445.  
Pat No. 7: Original, Book 4, Quartz, Page 447.  
Pat No. 8: Original, Book 4, Quartz, Page 537.  
Pat No. 9: Original, Book 4, Quartz, Page 539.  
Pat No. 10: Original, Book 4, Quartz, Page 541.  
Pat No. 11: Original, Book 4, Quartz, Page 543.  
Pat No. 12: Original, Book 4, Quartz, Page 545.  
Pat No. 13: Original, Book 4, Quartz, Page 547.  
Pat No. 14: Original, Book 4, Quartz, Page 549.

Defendant's Exhibit No. 4—(Continued)

- Pat No. 15: Original, Book 4, Quartz, Page 551.
- Pat No. 16: Original, Book 4, Quartz, Page 553.
- Pat No. 17: Original, Book 4, Quartz, Page 555.
- Pat No. 18:                      , Book    , Quartz, Page    .
- Pat No. 19:                      , Book    , Quartz, Page    .
- Pat No. 20:                      , Book    , Quartz, Page    .
- Pat No. 21:                      , Book    , Quartz, Page    .
- Pat No. 22:                      , Book    , Quartz, Page    .
- Pat No. 23:                      , Book    , Quartz, Page    .
- M. W. No. 1: Original, Book 4, Quartz, Page 501.
- M. W. No. 2: Original, Book 4, Quartz, Page 503.
- M. W. No. 3: Original, Book 4, Quartz, Page 505.
- M. W. No. 4: Original, Book 4, Quartz, Page 507.
- M. W. No. 5: Original, Book 4, Quartz, Page 509.
- M. W. No. 6: Original, Book 4, Quartz, Page 511.
- M. W. No. 7: Original, Book 4, Quartz, Page 513.
- M. W. No. 8: Original, Book 4, Quartz, Page 515.
- M. W. No. 9: Original, Book 4, Quartz, Page 517.
- M. W. No. 10: Original, Book 4, Quartz, Page 519.
- M. W. No. 11: Original, Book 4, Quartz, Page 521.
- M. W. No. 12: Original, Book 4, Quartz, Page 523.
- M. W. No. 13: Original, Book 4, Quartz, Page 525.
- M. W. No. 14: Original, Book 4, Quartz, Page 527.
- M. W. No. 15: Original, Book 4, Quartz, Page 529.
- M. W. No. 16: Original, Book 4, Quartz, Page 531.

## Defendant's Exhibit No. 4—(Continued)

M. W. No. 17: Original, Book 4, Quartz, Page 533.

M. W. No. 18: Original, Book 4, Quartz, Page 535.

M. W. No. 19: Original, Book 7, Quartz, Page 314.

M. W. No. 20: Original, Book 7, Quartz, Page 315.

M. W. No. 21: Original, Book 7, Quartz, Page 316.

M. W. No. 22: Original, Book 7, Quartz, Page 317.

M. W. No. 23: Original, Book 7, Quartz, Page 318.

M. W. No. 24: Original, Book 7, Quartz, Page 319.

Lilly No. 1: Original, Book 7, Quartz, Page 95.

Lilly No. 2: Original, Book 7, Quartz, Page 96.

Lilly No. 3: Original, Book 7, Quartz, Page 97.

Lilly No. 4: Original, Book 7, Quartz, Page 98.

Lilly No. 5: Original, Book 7, Quartz, Page 99.

Lilly No. 6: Original, Book 7, Quartz, Page 100.

Lilly No. 7: Original, Book 7, Quartz, Page 101.

Lilly No. 8: Original, Book 7, Quartz, Page 103.

Lilly No. 9: Original, Book 7, Quartz, Page 104.

Lilly No. 10: Original, Book 7, Quartz, Page 102.

Lilly No. 11: Original, Book 7, Quartz, Page 105.

Lilly No. 12: Original, Book 7, Quartz, Page 106.

Sunday No. 1: Original, Book 5, Quartz, Page 134.

Defendant's Exhibit No. 4—(Continued)

Sunday No. 2: Original, Book 5, Quartz, Page 135.

Sunday No. 3: Original, Book 5, Quartz, Page 136.

Sunday No. 4: Original, Book 5, Quartz, Page 137.

Sunday No. 5: Original, Book 5, Quartz, Page 138.

Sunday No. 6: Original, Book 5, Quartz, Page 139.

Sunday No. 7: Original, Book 5, Quartz, Page 140.

Sunday No. 8: Original, Book 5, Quartz, Page 141.

Smoky Ridge No. 1: Original, Book 5, Quartz, Page 552.

Smoky Ridge No. 2: Original, Book 5, Quartz, Page 553.

Smoky Ridge No. 3: Original, Book 5, Quartz, Page 554.

Smoky Ridge No. 4: Original, Book 5, Quartz, Page 555.

Smoky Ridge No. 5: Original, Book 5, Quartz, Page 556.

Smoky Ridge No. 6: Original, Book 5, Quartz, Page 557.

Smoky Ridge No. 7: Original, Book 5, Quartz, Page 558.

Smoky Ridge No. 8: Original, Book 5, Quartz, Page 559.



Defendant's Exhibit No. 4—(Continued)

Meadow Creek Group

Meadow Creek No. 1: Patented, Book 4, Quartz,  
Page 118.

Meadow Creek No. 2: Patented, Book 4, Quartz,  
Page 184.

Meadow Creek No. 3: Patented, Book 4, Quartz,  
Page 185.

Meadow Creek No. 4: Patented, Book 4, Quartz,  
Page 186.

Meadow Creek No. 5: Patented, Book 4, Quartz,  
Page 187.

Meadow Creek No. 6: Amended, Book 6, Quartz,  
Page 21.

Meadow Creek No. 7: Amended, Book 6, Quartz,  
Page 22.

Meadow Creek No. 8: Amended, Book 6, Quartz,  
Page 23.

Meadow Creek No. 9: Amended, Book 6, Quartz,  
Page 24.

Meadow Creek No. 10: Amended, Book 6, Quartz,  
Page 25.

Meadow Creek No. 11: Amended, Book 6, Quartz,  
Page 26.

Meadow Creek No. 12: Amended, Book 6, Quartz,  
Page 27.

Meadow Creek No. 13: Amended, Book 6, Quartz,  
Page 28.

Meadow Creek No. 14: Amended, Book 6, Quartz,  
Page 29.

Meadow Creek No. 15: Amended, Book 6, Quartz,  
Page 30.

Defendant's Exhibit No. 4—(Continued)

Meadow Creek No. 16: Amended, Book 6, Quartz,  
Page 31.

Meadow Creek No. 17: Amended, Book 6, Quartz,  
Page 32.

Meadow Creek No. 18: Original, Book 4, Quartz,  
Page 419.

Meadow Creek No. 19: Original, Book 4, Quartz,  
Page 421.

Monday No. 1: Amended, Book 6, Quartz,  
Page 33.

Monday No. 2: Amended, Book 6, Quartz,  
Page 34.

Monday No. 3: Amended, Book 6, Quartz,  
Page 35.

Monday No. 4: Amended, Book 6, Quartz,  
Page 36.

Monday No. 5: Amended, Book 6, Quartz,  
Page 37.

Monday No. 6: Amended, Book 6, Quartz,  
Page 38.

Monday No. 7: Amended, Book 6, Quartz,  
Page 39.

Monday No. 8: Amended, Book 6, Quartz,  
Page 40.

Monday No. 9: Amended, Book 6, Quartz,  
Page 41.

Monday No. 10: Amended, Book 6, Quartz,  
Page 42.

Monday No. 11: Amended, Book 4, Quartz,  
Page 424.

## Defendant's Exhibit No. 4—(Continued)

Monday No. 12: Amended, Book 4, Quartz, Page 425.

Monday No. 13: Original, Book 7, Quartz, Page 325.

Monday No. 14: Original, Book 7, Quartz, Page 324.

J. S.: Amended, Book 6, Quartz, Page 43.

J. S. No. 2: Amended, Book 6, Quartz, Page 44.

J. S. No. 3: Amended, Book 6, Quartz, Page 45.

Bud No. 1: Amended, Book 6, Quartz, Page 1.

Bud No. 2: Amended, Book 6, Quartz, Page 2.

Bud No. 3: Amended, Book 6, Quartz, Page 3.

Bud No. 4: Amended, Book 6, Quartz, Page 4.

Bud No. 5: Amended, Book 6, Quartz, Page 5.

Bud No. 6: Amended, Book 6, Quartz, Page 6.

Bud No. 7: Amended, Book 6, Quartz, Page 7.

Bud No. 8: Amended, Book 6, Quartz, Page 8.

Bud No. 9: Amended, Book 6, Quartz, Page 9.

Bud No. 10: Amended, Book 6, Quartz, Page 10.

Bud No. 11: Amended, Book 6, Quartz, Page 11.

Bud No. 12: Amended, Book 6, Quartz, Page 12.

Bud No. 13: Amended, Book 6, Quartz, Page 13.

Bud No. 14: Amended, Book 6, Quartz, Page 14.

Bud No. 15: Amended, Book 6, Quartz, Page 15.

Bud No. 16: Amended, Book 6, Quartz, Page 16.

Bud No. 17: Amended, Book 6, Quartz, Page 17.

Bud No. 18: Amended, Book 6, Quartz, Page 18.

Bud No. 19: Amended, Book 6, Quartz, Page 20.

Bud No. 20: Original, Book 4, Quartz, Page 427.

Bud No. 21: Original, Book 4, Quartz, Page 429.

Bud No. 22: Original, Book 4, Quartz, Page 431.

Defendant's Exhibit No. 4—(Continued)

Bud No. 23: Original, Book 4, Quartz, Page 433.

Jack: Original, Book 7, Quartz, Page 84.

Jill: Original, Book 7, Quartz, Page 83.

B. No. 1: Original, Book 7, Quartz, Page 91.

B. No. 2: Original, Book 7, Quartz, Page 92.

B. No. 3: Original, Book 7, Quartz, Page 93.

B. No. 4: Original, Book 7, Quartz, Page 94.

S. B. No. 1: Original, Book 7, Quartz, Page 149.

S. B. No. 2: Original, Book 7, Quartz, Page 150.

S. B. No. 3: Original, Book 7, Quartz, Page 151.

S. B. No. 4: Original, Book 7, Quartz, Page 375.

S. B. No. 5: Original, Book 7, Quartz, Page 376.

S. B. No. 6: Original, Book 7, Quartz, Page 377.

S. B. No. 7: Original, Book 7, Quartz, Page 378.

S. B. No. 8: Original, Book 7, Quartz, Page 379.

S. B. No. 9: Original, Book 7, Quartz, Page 380.

S. B. No. 10: Original, Book 7, Quartz, Page 381.

S. B. No. 11: Original, Book 7, Quartz, Page 382.

S. B. No. 12: Original, Book 7, Quartz, Page 383.

S. B. No. 13: Original, Book 7, Quartz, Page 384.

S. B. No. 14: Original, Book 7, Quartz, Page 385.

Fairdeal No. 1: Original, Book 7, Quartz,  
Page 26.

Fairdeal No. 2: Original, Book 7, Quartz,  
Page 27.

Fairdeal No. 3: Original, Book 7, Quartz,  
Page 28.

Fairdeal No. 4: Original, Book 7, Quartz,  
Page 29.

Fairdeal No. 5: Original, Book 7, Quartz,  
Page 30.

## Defendant's Exhibit No. 4—(Continued)

Fairdeal No. 6: Original, Book 7, Quartz,  
Page 31.

Fairdeal No. 7: Original, Book 7, Quartz,  
Page 32.

Fairdeal No. 8: Original, Book 7, Quartz,  
Page .

Fairdeal No. 9: Original, Book 7, Quartz,  
Page 321.

Fairdeal No. 10: Original, Book 7, Quartz,  
Page 322.

Fairdeal No. 11: Original, Book 7, Quartz,  
Page 323.

Fairdeal No. 12: Original, Book 7, Quartz,  
Page 320.

Fairdeal No. 13: Original, Book 7, Quartz,  
Page 325.

Fairdeal No. 14: Original, Book 7, Quartz,  
Page 324.

Fairdeal No. 15: Original, Book 7, Quartz,  
Page .

A. No. 1: Original, Book 7, Quartz, Page 326.

A. No. 2: Original, Book 7, Quartz, Page 327.

A. No. 3: Original, Book 7, Quartz, Page 328.

A. No. 4: Original, Book 7, Quartz, Page 329.

A. No. 5: Original, Book 7, Quartz, Page 330.

A. No. 6: Original, Book 7, Quartz, Page 331.

A. No. 7: Original, Book 7, Quartz, Page 332.

Tamarack No. 1: Original, Book 7, Quartz, Page  
367.

Tamarack No. 2: Original, Book 7, Quartz, Page  
368.



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Tamarack No. 3: Original, Book 7, Quartz, Page 369.

Tamarack No. 4: Original, Book 7, Quartz, Page 370.

Tamarack No. 5: Original, Book 7, Quartz, Page 371.

Tin Can: Original, Book 5, Quartz, Page 465.

Tin Can No. 1: Original, Book 5, Quartz, Page 466.

Meadow Queen No. 1: Amended, Book 2, Placer, Page 473.

Meadow Queen No. 2: Amended, Book 2, Placer, Page 475.

Meadow Queen No. 3: Amended, Book 2, Placer, Page 477.

East Fork No. 1: Amended, Book 2, Placer, Page 466.

East Fork No. 2: Amended, Book 2, Placer, Page 467.

East Fork No. 3: Amended, Book 2, Placer, Page 469.

East Fork No. 4: Amended, Book 2, Placer, Page 471.

East Fork No. 5: Amended, Book 2, Placer, Page 329.

Meadow Creek No. 1: Amended, Book 2, Placer, Page 479.

Meadow Creek No. 2: Amended, Book 2, Placer, Page 481.

Meadow Creek No. 3: Amended, Book 2, Placer, Page 483.

## Defendant's Exhibit No. 4—(Continued)

Meadow Creek No. 4: Amended, Book 2, Placer,  
Page 485.

Meadow Creek No. 5: Amended, Book 2, Placer,  
Page 487.

Meadow Creek No. 6: Amended, Book 2, Placer,  
Page 489.

Meadow Creek No. 7: Amended, Book 2, Placer,  
Page 491.

Meadow Creek No. 8: Amended, Book 2, Placer,  
Page 493.

Meadow Creek No. 9: Amended, Book 2, Placer,  
Page 495.

Meadow Creek No. 10: Amended, Book 2, Placer,  
Page 497.

Meadow Creek No. 11: Amended, Book 2, Placer,  
Page 499.

Meadow Creek No. 12: Amended, Book 2, Placer,  
Page 501.

Meadow Creek No. 13: Amended, Book 2, Placer,  
Page 503.

Meadow Creek No. 14: Amended, Book 2, Placer,  
Page 505.

Meadow Creek No. 15: Amended, Book 2, Placer,  
Page 507.

Meadow Creek No. 16: Amended, Book 2, Placer,  
Page 509.

Meadow Creek No. 17: Amended, Book 2, Placer,  
Page 511.

Meadow Creek No. 18: Amended, Book 2, Placer,  
Page 513.

Defendant's Exhibit No. 4—(Continued)

Meadow Creek No. 19: Amended, Book 2, Placer, Page 515.

Meadow Creek No. 20: Amended, Book 2, Placer, Page 517.

Meadow Creek No. 21: Amended, Book 2, Placer, Page 519.

Placer Queen: Original, Book 2, Placer, Page 320.

J. C. No. 1: Original, Book 2, Placer, Page 546.

J. C. No. 2: Original, Book 2, Placer, Page 547.

J. C. No. 3: Original, Book 2, Placer, Page 548.

J. C. No. 4: Original, Book 2, Placer, Page 557.

J. C. No. 5: Original, Book 2, Placer, Page 559.

J. C. No. 6: Original, Book 2, Placer, Page 560.

J. C. No. 7: Original, Book 2, Placer, Page 561.

T. P. No. 1: Original, Book 3, Placer, Page 5.

T. P. No. 2: Original, Book 3, Placer, Page 6.

T. P. No. 3: Original, Book 3, Placer, Page 7.

T. P. No. 4: Original, Book 3, Placer, Page 8.

T. P. No. 5: Original, Book 3, Placer, Page 10.

T. P. No. 6: Original, Book 3, Placer, Page 9.

T. P. No. 7: Original, Book 3, Placer, Page 4.

J. U. C.: Original, Book 3, Placer, Page 3.

Y. P. C. No. 1: Original, Book 2, Placer, Page 524.

Y. P. C. No. 2: Original, Book 2, Placer, Page 526.

Y. P. C. No. 3: Original, Book 2, Placer, Page 527.

Y. P. C. No. 4: Original, Book 2, Placer, Page 528.

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Y. P. C. No. 15: Original, Book 2, Placer, Page 542.

Y. P. C. No. 16: Original, Book 2, Placer, Page 543.

Y. P. C. No. 17: Original, Book 2, Placer, Page 544.

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Antimony Group

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M. B. No. 7: Original, Book , Quartz, Page .

M. B. No. 8: Original, Book , Quartz, Page .

M. B. No. 9: Original, Book , Quartz, Page .

M. B. No. 10: Original, Book , Quartz, Page .

All of which records are hereby referred to for a more particular description of said mining claims;

And Whereas, The United Mercury Mines Company, a corporation, did on or about the 5th day of August, 1927, enter into an option agreement with F. W. Bradley of San Francisco, which said option agreement pertained to the said Cinnabar and Meadow Creek Groups of lode and placer claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, said option contract having been assigned by said F. W. Bradley to the Yellow Pine Company, a corporation, copies of which option agreement and said assignment are attached hereto and marked Exhibits A and B, respectively;

And Whereas, The party of the second part went

Defendant's Exhibit No. 4—(Continued)  
into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than Twenty Four Thousand (\$24,000.00) Dollars;

And Whereas, The party of the second part has in accordance with the provisions of said option agreement dated August 5th, 1927, performed the necessary annual assessment work during each and every year from the date of said option agreement;

And Whereas, The party of the second part did upon signing and in accordance with the said option agreement dated August 5th, 1927, pay unto the said first party or for its use and benefit the sum of Two Thousand One Hundred Forty Seven and 75/100 (\$2,147.75) Dollars;

And Whereas, The party of the second part did pay to the said first party or for its use and benefit, the sum of Ten Thousand (\$10,000.00) Dollars on or before the first day of August, 1928, and also the sum of Ten Thousand (\$10,000.00) Dollars on or before the first day of February, 1929, in accordance with the provisions of said option agreement dated August 5th, 1927;

And Whereas, The party of the second part has in each and every other respect complied with all the terms and conditions of said option agreement dated August 5th, 1927, from the date thereof;



## Defendant's Exhibit No. 4—(Continued)

And Whereas, The said United Mercury Mines Company, a corporation, and the said Yellow Pine Company, a corporation, did by a supplemental agreement entitled "Addenda To Agreement And Option Dated August 5th, 1927, Between The United Mercury Mines Company and F. W. Bradley Relating To The Cinnabar And Meadow Creek Groups Of Lode Mining Claims", and dated the first day of February, 1928, further modify and change certain parts of said option contract dated the 5th day of August, 1927, copy of which supplemental agreement is attached hereto and marked Exhibit C.

And Whereas, The said option contract dated August 5th, 1927, was further modified and changed in certain parts by a supplemental agreement dated the 30th day of August, 1929, by and between the said United Mercury Mines Company, a corporation, and the said Yellow Pine Company, a corporation, copy of which supplemental agreement is attached hereto and marked Exhibit D;

And Whereas, The said United Mercury Mines Company, a corporation, and the said Yellow Pine Company, a corporation, desire, each for itself, further changes, additions, and modifications in and to said option agreement dated August 5th, 1927, and said supplemental agreements dated February 1st, 1928, and August 30th, 1929, Exhibits C and D respectively, attached hereto;

And Whereas, The said United Mercury Mines Company, a corporation, and the said Yellow Pine



## Defendant's Exhibit No. 4—(Continued)

Company, a corporation, further desire to express (a) the covenants and agreements made and entered into by the said option agreement dated August 5th, 1927, and (b) the modifications of which as expressed in the said supplemental agreements dated February 1st, 1928, and August 30th, 1929, respectively, and (c) further changes, additions and modifications in a single instrument of option contract and agreement for the purpose of clarity and convenience of reference;

Now, Therefore, For and in consideration of the premises and the mutual covenants herein contained, and for the sum of Ten (\$10.00) Dollars, paid by the party of the second part, the receipt whereof by the party of the first part is hereby acknowledged, it is mutually covenanted, agreed and understood by and between the parties hereto as follows:

## I.

It is hereby specifically understood and agreed that this instrument of option contract and agreement rescinds, nullifies, supersedes and takes the place of all other contracts and agreements, whether attached hereto as exhibits or not, between the parties hereto, and that all negotiations between the parties hereto relative to the hereinbefore described properties, whether written or oral of any kind or character, are merged herein, and that this agreement is to be construed without reference to any of said former agreements or negotiations.

## Defendant's Exhibit No. 4—(Continued)

## Merger of Negotiations

## II.

The said party of the first part does hereby grant and accord unto the said party of the second part, the sole and exclusive right, privilege and option to purchase all of the right, title and interest of the first party in and to the following:

## Option Given

(a) Said Cinnabar and Meadow Creek and Antimony Groups of mining claims as hereinbefore described.

(b) Together with all dips, spurs and angles of all lodes therein.

(c) Together with all other mining claims now owned by or that may hereafter be located or acquired by said first party during the life of this agreement within 1500 linear feet of the extreme exterior boundaries of the said Cinnabar, Meadow Creek and Antimony Groups of mining claims, or within, or adjacent, or contiguous thereto.

(d) Together with the tenements, hereditaments and appurtenances and rights and privileges thereunto belonging or in any wise appertaining.

(e) Together with the personal property belonging to said first party situate upon or in said claims.

(f) And together with all mill sites, water rights, tail races, tailing sites, and tailing dams or easements that are now owned or may in the future be acquired by said first party for use in connection with said claims, or any of them.

Defendant's Exhibit No. 4—(Continued)  
Purchase Price

The purchase price for all of which to be the sum of One Million Five Hundred Fifty Thousand (\$1,550,000.00) Dollars, lawful money of the United States of America, said sum to be paid (subject to the right of the second party to discontinue this agreement and to be relieved from further obligation to proceed hereunder as set forth in Paragraph XVI hereof) at the times and in the manner hereinafter provided, and said option to be subject at all times to the terms, covenants and provisions hereinafter expressed.

## III.

The said party of the first part does hereby give, grant and accord unto the said party of the second part, or its representative or representatives, the sole and exclusive option, privilege and right to enter in and upon and to continue with the actual possession of said mining claims and work in and on them for the purpose of developing, equipping and extracting ores or metals from said claims, and in the manner and to the extent and at such places as may in the judgment of said second party be best suited to the best interests of both parties hereto, said option, however, to be subject at all times to the terms, covenants and provisions hereinafter expressed.

## IV.

## Development Work

The party of the second part hereby agrees, in

## Defendant's Exhibit No. 4—(Continued)

the event it continues to exercise its rights under this option, to do and perform (subject always to the right of the second party to discontinue this agreement and to be relieved from any further obligation to proceed hereunder as set forth in Paragraph XVI hereof) the following:

(a) To perform and complete upon, or in or for the benefit of said claims, prior to the first day of May of each and every year that said second party remains in or is entitled to possession of said properties under the terms of this agreement, the necessary annual assessment work to hold and protect said claims under the mining laws of the United States and the State of Idaho, and to file and record, on or before the first day of June of each and every year during the occupation of said premises by said second party under the provisions of this agreement, in the office of the county Recorder of Valley County, State of Idaho, on behalf of the first party, the necessary proofs of such annual labor or assessment work upon said mining claims.

(b) To spend in, upon, or for the benefit or account of said properties, annually during the life of this agreement, the sum of at least Twenty Four Thousand (\$24,000.00) Dollars, said sum to include but not necessarily in addition to, such sums required for annual assessment work as provided in Paragraph (a) immediately preceding.

(c) To pay to the party of the first part at the times and in the manner hereinafter provided a royalty to apply on purchase price, based on a



## Defendant's Exhibit No. 4—(Continued)

percentage of the Net Proceeds as determined by the difference between Gross Proceeds and Operating Costs, said net proceeds, gross proceeds and operating costs being more explicitly defined hereinafter, and said percentage of net proceeds to be determined in the following manner:

## Certain Terms Defined

First: At the end of every calendar month, during the life of this agreement, the aggregate Total Capital Investment of the second party shall be computed, and also the aggregate total Net Proceeds, from the beginning to even date shall be computed, and, at any time when at the end of each successive calendar month, the sum of such aggregate Total Capital Investment so computed plus est at the rate of eight (8%) per cent on the Net Capital Investment as hereinafter defined, shall exceed the share of second party in the aggregate amount of total Net Proceeds, likewise computed of even date, then, in such event and whether such excess shall have been continuous from month to month or intermittent during such months, said second party shall pay to said first party, at the times and in the manner hereinafter provided, a royalty for the month last past as of the date of such computation, twenty (20%) per cent of the said monthly net proceeds, if any, for the said month last past, and the second party shall be entitled to keep for its own use and benefit the remaining eighty (80%) per cent of said monthly net



## Defendant's Exhibit No. 4—(Continued)

proceeds; the terms Total Capital Investment, Net Capital Investment and Net Proceeds being more explicitly defined hereinafter; provided that when the share of second party in such aggregate amount of Net Proceeds so computed as aforesaid shall exceed the Total Capital Investment plus interest at eight (8%) per cent on the said Net Capital Investment as and when computed as aforesaid, then the said royalty for such month shall be fifty (50%) per cent of said monthly net proceeds, if any, computed and payable as aforesaid, said second party retaining for its own use and benefit the remaining fifty (50%) per cent of such monthly net proceeds.

## Manner of Payment

Said royalty to be deposited by the second party in the Crocker First National Bank of San Francisco, California, to and for the credit and order of the said first party on or before the twentieth (20th) day of the calendar month next succeeding the receipt of said net proceeds by the second party, and the same to be so paid each and every month when there are any net proceeds until the purchase price of the said mining claims and properties has been completed as herein provided.

## Gross Proceeds

By the term Gross Proceeds as used in this agreement is meant and intended such sums of money as may be received by the said second party from the sale of ores, concentrates and/or metals or other

Defendant's Exhibit No. 4—(Continued)  
products derived by the second party from said properties under the terms of this agreement.

#### Operating Costs

By the term Operating Costs as used in this agreement is meant and intended all moneys expended by the said second party in the operation, maintenance and repairs of mine, mill, power and/or other plants and equipment operated in, upon or for the benefit and account of said properties or the mining operations hereof, and in preparatory mining, stoping and extraction of ores from said claims, and for the transportation, marketing, smelting and/or refining of ores, concentrates, metals and/or other products derived from said claims, and for taxes, insurance, supervision, legal and other reasonable overhead costs incurred by second party by reason of its possession and/or operation of said properties, plants and equipment. Said operating costs to be the actual cash cost to second party for labor, materials, insurance, taxes, transportation and/or other items of expense necessary to or required for or by reason of the possession of said premises and the production and marketing of said products derived from said claims by second party under the terms of this agreement.

#### Net Proceeds

By the term Net Proceeds, as used in this agreement, is meant and intended the difference between such sums received by second party under the term

## Defendant's Exhibit No. 4—(Continued)

and above definition of gross proceeds and such sums of money expended by the second party under the term and above definition of operating costs.

## Total Capital Investment

By the term Total Capital Investment, as used in this agreement, is meant and intended any and all moneys expended by the second party in, upon and/or for the benefit and/or account of said properties for the following purposes:—

(a) For mine, mill, power, and/or other plants and equipment including tunnels, roads, pipe lines, power lines, flumes and ditches, and all additions and improvements adding to the value or capacities thereof.

(b) For the search for and development of ore bodies within said mining claims.

(c) For the examination of said properties, research or experimental work upon ores from said claims, legal work in connection with titles and agreements appertaining to said properties, assessment work, insurance, taxes, supervision and/or any and all other general expenses incurred by the second party for the benefit or account of said properties.

## Net Capital Investment

By the term Net Capital Investment, as used in this agreement, is meant and intended that sum of money which at the end of any calendar month during the life of this agreement shall be the difference or balance between the sum of such moneys expended by the second party under the foregoing

## Defendant's Exhibit No. 4—(Continued)

term and definition of total capital investment and (in accordance with the first provision of Paragraph IV-c, page 15 of this agreement) the sum of such moneys as may have been received by the second party under the foregoing term and definition of net proceeds. Interest of said net capital investment as above defined shall be computed on the same during the life of this agreement as of and on the last day of each and every calendar month in which there remains or occurs a sum of money termed and defined as net capital investment, said interest to be computed against said net capital investment at the rate of eight (8%) per cent per annum and at the end of each calendar year said interest as computed against said monthly balances shall be added to said net capital investment and become a part thereof.

## Improvements Not Severable

(d) That the second party will not remove any machinery, building or other equipment now situate upon or used in connection with the hereinbefore described properties and that it will keep the same in good condition and repair at its own expense, and the second party also agrees that all improvements made and buildings placed upon said premises by the second party shall become appurtenant thereto, and in the event the second party does not complete the purchase of said properties under the terms of this agreement and in case of termination, cancellation or forfeiture hereof or



## Defendant's Exhibit No. 4—(Continued)

under, the said improvements and buildings shall become the property of the first party, provided, second party may remove severable machinery and supplies installed or placed upon said property by second party.

## No Liens Allowable

(e) That the second party will keep said properties and the whole thereof free and clear of all liens of whatsoever kind or character, and the second party hereby covenants for itself and its successors and assigns, to hold the first party harmless from any and all liens and claims of whatsoever kind or nature, for wages or supplies, or any indebtedness whatsoever created by said second party by reason of its possession of, or its working of said claims. That the second party shall not be deemed or considered the agent of the first party under the provisions of the Statutes of Idaho relating to liens or otherwise, except for the performance by second party of said annual assessment work.

## Notices to Be Posted

(f) That the second party hereto will make the necessary affidavits and post and record the necessary notices to comply with the provisions of Section 2311, Idaho Compiled Statutes and the laws of the State of Idaho, so as to notify all persons that the operations to be carried on under this agreement shall be at the sole cost and expense of the second party, and that the first party hereto shall not be responsible or liable in any way for



## Defendant's Exhibit No. 4—(Continued)

the debts and obligations of the second party, and that contracts for labor, supplies or material by the second party shall not bind the first party or the hereinbefore described mining properties, or any part thereof, and that full compliance with the Statutes of the State of Idaho in regard to the making and filing and recording of the notices to effectuate this purpose shall be had immediately upon the second party entering into the possession of said property.

## Work in Miner-like Manner

(g) To perform all work done upon said mining claims during the existence of this agreement in a proper and miner-like manner and that all workable tunnels and raises now existing thereon and all tunnels constructed thereunder shall be kept open, passable, properly timbered, and in shape by second party and that all stakes and monuments marking said claims shall be kept up and marked.

## Taxes

(h) To pay, prior to delinquency all taxes of every kind and character that may be levied or assessed against said property during the life of this agreement.

## V.

## Deed in Escrow

The said party of the first part does hereby covenant and agree with the said party of the second part to do and perform the following things con-

## Defendant's Exhibit No. 4—(Continued)

currently with the execution of this agreement, to-wit:

(a) To execute a good and sufficient deed or deeds granting and conveying to said second party all the right, title and interest of the said first party in and to said Cinnabar, Meadow Creek and Antimony Groups of mining claims and the whole thereof (except as against the paramount title of the United States of America) together with the buildings and improvements and personal property of said first party situate in or upon or appertaining to said claims, and to deposit in escrow with the Crocker First National Bank of San Francisco, California, said deed or deeds with appropriate instructions to said Bank to deliver said deed or deeds to the said second party upon the performance by it of all the terms and conditions of this agreement and the payment in full of One Million Five Hundred Fifty Thousand (\$1,550,000.00) Dollars, as herein provided.

(b) To execute and acknowledge such statement or statements as may be desired by the said second party to be recorded in the office of the County Recorder of Valley County, Idaho, showing the giving of the hereinbefore described options.

## VI.

The said party of the first part does hereby further covenant and agree, to-wit:

(a) Upon the demand of the said second party to make and execute and place in escrow with the

Defendant's Exhibit No. 4—(Continued)  
said Crocker First National Bank of San Francisco, California, any further deeds, instruments, conveyances or writings of whatsoever character that may be required by the said second party in order to convey to it all the right, title and interest in and to said group of claims and any and all claims that may hereafter be located within the exterior boundaries of said Cinnabar, Meadow Creek and Antimony Groups of mining claims or within 1500 feet of the exterior limits thereof.

#### VII.

It is further stipulated and agreed by and between the parties hereto that the purchase price for the said mining claims shall be the sum of One Million Five Hundred Fifty Thousand \$1,550,000.00) Dollars.

#### VIII.

##### Payment Condition Precedent to Delivery

It is further stipulated and agreed by and between the parties hereto that the payment of said purchase price is a condition precedent to the delivery of any deed or deeds for said property, and that the deed or deeds for said mining claims and properties shall be delivered to second party upon the payment to first party of the said sum of One Million Five Hundred Fifty Thousand (\$1,550,000.00) Dollars.

#### IX.

##### Advance of \$11,000.00

It is further stipulated and agreed by and be-

## Defendant's Exhibit No. 4—(Continued)

tween the parties hereto that upon the execution of this agreement, second party will advance to first party the sum of Eleven Thousand (\$11,000.00) Dollars, the same to draw interest at the rate of eight (8%) per cent per annum and to be considered as a capital investment by second party as that term is hereinbefore defined and to be repaid second party in the same manner as any other capital invested by second party under this agreement.

## X.

It is further stipulated and agreed by and between the parties hereto that all royalties and/or any and all other payments made to the first party by the second party in accordance with this and/or the said preceding agreements and/or addendas thereto, shall be applied to and constitute a part payment of the said purchase price, and the said first party hereby acknowledges the receipt of the sum of Thirty Three Thousand One Hundred Forty Seven and 75/100 (\$33,147.75) Dollars as having been received by it from the second party hereto as part payment on said purchase price.

## XI.

## Abstracts

It is further stipulated and agreed that within ninety days after written demand therefor, by the party of the second part to the party of the first part, the said party of the first part shall deliver to the Crocker First National Bank of San Fran-



## Defendant's Exhibit No. 4—(Continued)

cisco, California, for delivery to the party of the second part, or its assigns, abstracts of title for the above described property. It is agreed that the party of the second part, or its assigns, shall have a period of ninety (90) days after said abstracts are delivered to said Crocker First National Bank for the examination of said abstracts of title, and at or before the end of said ninety days shall deliver to the party of the first part a written opinion containing all material objections that said party of the second part may raise to the title (except the paramount right of the United States) of the party of the first part to said claims, and the party of the first part shall have ninety days within which to correct such material defects in said possessory right, unless, in order to correct such defects, it is necessary to bring suit or suits to quiet title, in which event a reasonable time shall be allowed the party of the first part therefor, it being understood that the corrections of such defects are not precedent nor dependent conditions to the making of the payments and the performance of the conditions herein by the party of the second part to be kept and performed.

In the event second party shall fail to deliver written objections as and within the time aforesaid, or if first party shall make corrections as aforesaid, the second party or its assigns shall be conclusively held to have accepted and approved the title as such, as first party hereunder has agreed, upon performance of this option, to convey.



## Defendant's Exhibit No. 4—(Continued)

## XII.

It is further agreed and understood that there are certain claims of liens against said Hermes claim which are now in litigation, totaling not to exceed the sum of Sixty Thousand (\$60,000.00) Dollars, and which first party believes to be fraudulent and without foundation (the District Court of Valley County, Idaho, having already held one of said liens to be void and fraudulent) and said first party agrees to pay and discharge all of said liens, together with legal interest and costs of respective suits, when and if they are finally decided by the Supreme Court of Idaho to be valid. In order to protect its right to possession second party may pay any judgment against, or redeem such property from any sale under said liens and deduct the cost thereof from the next payment due from it thereafter.

## XIII.

## New Claims

It is agreed that first party at all times during the existence of this contract, shall have free access to the above described properties for the purpose of inspecting said properties and making surveys, setting stakes and amending and making locations; that all amended locations made, as well as all locations of new claims and of fractional claims, within or upon the lands embraced in or within fifteen hundred (1500) feet of the general exterior lines of the general groups of claims above or within described, and all locations of millsites, power

## Defendant's Exhibit No. 4—(Continued)

plants, sites and water rights made either by first party or second party or its assigns, prior to delivery of conveyance hereunder, shall be made in the name of and for the party of the first part, and that all such new and amended locations shall be deemed and considered as included in this option and as part of the property to be conveyed to second party and no additional price shall be paid therefor, in case the payments hereinbefore described are made at the time and at the place and in the manner herein described. The party of the first part agrees that, upon the written demand of the party of the second part, it will make and execute and place in escrow in said Crocker First National Bank of San Francisco, California, a deed or deeds covering and conveying all of said new locations and filings to the party of the second part, to be held by said Bank subject to the terms and conditions of this option.

## XIV.

## Patents

The party of the first part agrees that upon the written demand of second party, it will, in its own name, apply for United States Patent or Patents for the above described mining claims, the same to be secured, however, at the expense of the second party.

## XV.

## Modification in Writing Waivers

It is further stipulated and agreed that no modification shall be of any force or effect or binding

## Defendant's Exhibit No. 4—(Continued)

upon either or any of the parties hereto unless made in writing and signed by both parties hereto; and that the waiver by first party of any breach of any one or more covenants shall not be construed as a waiver of the breach of any covenant, nor of time as of the essence hereof.

## XVI.

## Forfeiture

It is hereby expressly stipulated and agreed that this is an option contract and not a contract of purchase, and not a buy and sell agreement, nor a contract of or to purchase, and that time is of the essence of this contract, and that in the event the party of the second part fails to perform the conditions of this agreement strictly according to the terms hereof, or fails to keep each and every covenant by it to be kept, and fails within 60 days after the receipt of notice and demand from first party to keep and perform any covenant herein by it to be kept and performed, then in that event, all the right of the party of the second part, and its assigns, shall at the option of the party of the first part terminate, and all the payments and improvements which shall have been made by the party of the second part, or its assigns, and all buildings erected or used as hereinbefore provided, shall in such event be forfeited to the party of the first part, and that said payments and improvements shall be considered as liquidated damages, the manner of ascertaining the actual damages being difficult, provided, however, that in the event

## Defendant's Exhibit No. 4—(Continued)

second party desires at any time to be relieved from further obligation to proceed under this agreement it shall give notice in writing to that effect by United States mail, postage prepaid, or by telegram to the party of the first part, or shall serve upon first party at 605 Eastman Building, Boise, Idaho, and upon the Crocker First National Bank of San Francisco, California, a written notice of its intention not to proceed further under this agreement, and shall thereafter be relieved from all obligation to proceed under, and from any and all liability on account of any omission thereafter, any thing herein to the contrary notwithstanding; that said Crocker First National Bank of San Francisco shall return the deed to first party herein provided for, and the same shall be null and void.

## XVII.

## Surrender of Possession

It is further stipulated and agreed that upon the failure of the party of the second part to perform any terms or conditions of this contract, it will, upon the demand of the first party, at once surrender said premises to the party of the first part.

## XVIII.

## Inspection of Claims and Work

It is specifically agreed that during the existence of this contract, and during the time the party of the second part shall have the right to the possession of said property under this contract, the party of the first part, its agents and representatives,



## Defendant's Exhibit No. 4—(Continued)

shall have at all reasonable times free access to said property and the whole thereof, for the purpose of inspecting the nature, character and quantity of work being performed by the party of the second part thereon, but such inspection shall be conducted in such manner as not to interfere with the work of the party of the second part.

## XIX.

## Inspection of Books

The party of the second part hereby agrees to furnish all information, including smelter returns, correspondence and bank statements which first party may require in order to assure it that it is receiving the amount of royalty or net proceeds of said property as herein provided for. Second party further agrees to render to first party at Boise, Idaho, on the 20th day of each month, a statement which shall fully set forth the full particulars of the operations of the preceding month, and at the same time making such purchase price payments as may then be due under the terms of this agreement, and the party of the first part, at reasonable times, or at least every six months, shall have access to the books of account of the party of the second part relating to the operation of said property for the purpose of inspection.

## XX.

## Assignment

It is further expressly agreed and covenanted



## Defendant's Exhibit No. 4—(Continued)

that this agreement is assignable by second party, and that this agreement and all its terms and conditions shall be binding upon the heirs, successors and assigns of both the parties hereto; provided, however, that in the event the second party makes an assignment of this option, its assignee or assignees shall, by the taking of this agreement or assignment, assume all obligations to be performed hereunder by the second party, and thereupon the second party shall notify the first party in writing of such assignment, giving the name and address of such assignee or assignees, and from and after the receipt of such notice by the first party, second party shall be relieved from all liability on account of any act or omission on its part thereafter.

## XXI.

It is further stipulated and agreed that in the event the party of the second part decides that any of the claims hereinbefore described do not have sufficient mineral to justify the development work or the doing of the annual assessment work thereon that such claims may be abandoned whenever first party consents thereto in writing, signed by the President and Secretary of the party of the first part.

UNITED MERCURY MINES  
COMPANY, a Corporation,

/s/ By J. J. OBERBILLIG,  
President.

Defendant's Exhibit No. 4—(Continued)

Attest:

/s/ J. F. KOELSCH, Secretary,  
Party of the First Part.

YELLOW PINE COMPANY,  
a Corporation,

/s/ By F. W. BRADLEY,  
President.

Attest:

/s/ E. A. GRIFFEN, Secretary.  
Party of the Second Part.

[Seal]

## EXHIBIT A

### Agreement

This agreement, made and entered into at San Francisco, California, this 5th day of August, 1927, by and between the United Mercury Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho with its principal office at Boise, Ada County, Idaho, the Party of the First Part, and F. W. Bradley, of San Francisco, the Party of the Second Part (said Party of the First Part acting herein pursuant to the authority of the Board of Directors), Witnesseth:

### Description of Claims

That whereas, the party of the first part is the owner of (except as against the paramount title

Defendant's Exhibit No. 4—(Continued)  
of the United States) and is entitled to and in possession of certain lode and placer mining claims situated in the Yellow Pine Mining District, Valley County, State of Idaho, commonly called the Cinnabar Group of Lode Mining Claims and the Meadow Creek Group of Lode and Placer Mining Claims, and comprising the following named mining claims, the notices of location of which are of record in the office of the County Recorder of Valley County, State of Idaho, in the Book and at the Page as herein stated, to-wit:

Cinnabar Group

Hermes: Book 4, Quartz, Page 194.

Pretty Maid: Book 4, Quartz, Page 195.

Vermillion: Book 4, Quartz, Page 188.

Flyer: Book 4, Quartz, Page 407.

Emerald No. 1: Book 3, Quartz, Page 396.

Emerald No. 2: Book 3, Quartz, Page 398.

North Star Fraction: Book 3, Quartz, Page 614.

Hard Climb No. 1: Book 5, Quartz, Page 31.

Hard Climb No. 2: Book 5, Quartz, Page 32.

Hard Climb No. 3: Book 5, Quartz, Page 33.

Hard Climb No. 4: Book 5, Quartz, Page 34.

Mountain Ridge No. 1: Book 5, Quartz, Page 30.

Mountain Ridge No. 2: Book 5, Quartz, Page 28.

Mountain Ridge No. 3: Book 5, Quartz, Page 29.

Mountain Ridge No. 4: Book 5, Quartz, Page 27.

Midnight No. 1: Book 3, Quartz, Page 445.

Midnight No. 2: Book 3, Quartz, Page 447.

## Defendant's Exhibit No. 4—(Continued)

Smith Extension No. 1: Book 3, Quartz, Page 567.

Smith Extension No. 2: Book 3, Quartz, Page 568.

Smith Extension No. 3: Book 3, Quartz, Page 573.

Smith Extension No. 4: Book 3, Quartz, Page 569.

Smith Extension No. 5: Book 3, Quartz, Page 571.

Smith Extension No. 6: Book 3, Quartz, Page 572.

Annie Sell: Amended, Book 4, Quartz, Page 192.

Gold King: Book 3, Quartz, Page 337.

Gold King No. 2: Book 3, Quartz, Page 327.

Gold King No. 1: Book 3, Quartz, Page 323.

Gold King No. 3: Book 4, Quartz, Page 6.

Monumental No. 1: Book 3, Quartz, Page 517.

Monumental No. 2: Book 3, Quartz, Page 513.

Monumental No. 3: Book 3, Quartz, Page 516.

Monumental No. 4: Book 3, Quartz, Page 512.

Monumental No. 5: Book 3, Quartz, Page 511.

Monumental No. 6: Book 3, Quartz, Page 509.

Monumental No. 7: Book 3, Quartz, Page 600.

West Side No. 1: Book 3, Quartz, Page 508.

West Side No. 2: Book 3, Quartz, Page 507.

Golden Gate No. 1: Book 3, Quartz, Page 476.

Golden Gate No. 2: Book 3, Quartz, Page 475.

Golden Gate No. 3: Book 3, Quartz, Page 474.

Golden Gate No. 4: Book 4, Quartz, Page 191.

El Roy: Book 3, Quartz, Page 433.

Defendant's Exhibit No. 4—(Continued)

Quicksilver Queen No. 1: Book 3, Quartz, Page 578.

Quicksilver Queen No. 2: Book 3, Quartz, Page 577.

First National No. 1: Book 3, Quartz, Page 402.

Liberty: Book 3, Quartz, Page 405.

Liberty No. 1: Book 3, Quartz, Page 406.

U. S. A.: Book 3, Quartz, Page 403.

High Rock No. 1: Book 3, Quartz, Page 489.

High Rock No. 2: Book 3, Quartz, Page 490.

High Rock No. 3: Book 3, Quartz, Page 491.

High Rock No. 4: Book 3, Quartz, Page 493.

High Rock No. 5: Book 3, Quartz, Page 494.

Victor No. 1: Book 3, Quartz, Page 453.

Victor No. 2: Book 3, Quartz, Page 455.

Victor No. 3: Book 3, Quartz, Page 456.

Victor No. 4: Book 3, Quartz, Page 458.

Victor No. 5: Book 3, Quartz, Page 459.

Monumental Quicksilver: Book 5, Quartz, Page 12.

Mountain Chief No. 1: Book 3, Quartz, Page 388.

Mountain Chief No. 2: Book 3, Quartz, Page 390.

Mountain Chief No. 3: Book 3, Quartz, Page 391.

Mountain Chief No. 4: Book 3, Quartz, Page 392.

Mountain Chief No. 5: Book 3, Quartz, Page 436.

Mountain Chief No. 6: Book 3, Quartz, Page 437.

Mountain Chief No. 7: Book 3, Quartz, Page 439.

White Metal: Book 3, Quartz, Page 324.

White Metal No. 1: Book 3, Quartz, Page 385.

White Metal No. 2: Book 3, Quartz, Page 386.

White Metal No. 3: Book 3, Quartz, Page 387.

White Metal No. 5: Book 3, Quartz, Page 395.



## Defendant's Exhibit No. 4—(Continued)

White Metal No. 6: Book 3, Quartz, Page 394.

Mountain Bell: Book 3, Quartz, Page 325.

Mountain Bell Fraction: Book 3, Quartz, Page 468.

Mountain Bell No. 1: Book 3, Quartz, Page 470.

Vermilion Extension No. 1: Book 4, Quartz, Page 190.

## Amended

Vermilion Extension No. 2: Book 5, Quartz, Page 70.

Vermilion Extension No. 3: Book 5, Quartz, Page 71.

Vermilion Extension No. 4: Book 5, Quartz, Page 72.

Friends No. 1: Book 5, Quartz, Page 75.

Friends No. 2: Book 5, Quartz, Page 69.

Friends No. 3: Book 5, Quartz, Page 74.

Friends No. 4: Book 5, Quartz, Page 68.

North Star No. 1: Book 3, Quartz, Page 460.

North Star No. 2: Book 3, Quartz, Page 461.

North Star No. 3: Book 3, Quartz, Page 463.

North Star No. 4: Book 3, Quartz, Page 464.

North Star No. 5: Book 3, Quartz, Page 465.

White Metal No. 4: Book 3, Quartz, Page 383.

And the West End lode mining claims the notice of location of which is of record in the office of the County Recorder of Idaho County, Idaho in Book 20 of Quartz Locations, at page 146.

## Meadow Creek Group

Meadow Creek No. 1: Patented, Book 4, Page 118.

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Defendant's Exhibit No. 4—(Continued)

Meadow Creek No. 2: Patented, Book 4, Page 184.

Meadow Creek No. 3: Patented, Book 4, Page 185.

Meadow Creek No. 4: Patented, Book 4, Page 186.

Meadow Creek No. 5: Patented, Book 4, Page 187.

The United States Patent for the above described claims being of record in the office of the County Recorder of Valley County, Idaho in Book...of..., at page....

Meadow Creek No. 6: Book 5, Page 186.

Meadow Creek No. 7: Book 5, Page 187.

Meadow Creek No. 8: Book 5, Page 188.

Meadow Creek No. 9: Book 5, Page 189.

Meadow Creek No. 10: Book 5, Page 190.

Meadow Creek No. 11: Book 5, Page 191.

Meadow Creek No. 12: Book 5, Page 192.

Meadow Creek No. 13: Book 5, Page 193.

Meadow Creek No. 14: Book 5, Page 194.

Meadow Creek No. 15: Book 5, Page 195.

Meadow Creek No. 16: Book 5, Page 196.

Meadow Creek No. 17: Book 5, Page 197.

Monday No. 1: Book 5, Page 423.

Monday No. 2: Book 5, Page 424.

Monday No. 3: Book 5, Page 425.

Monday No. 4: Book 5, Page 426.

Monday No. 5: Book 5, Page 427.

Monday No. 6: Book 5, Page 428.

Monday No. 7: Book 5, Page 429.

## Defendant's Exhibit No. 4—(Continued)

Monday No. 8: Book 5, Page 430.

J. S.: Book 5, Page 160.

J. S. No. 2: Book 5, Page 161.

J. S. No. 3: Book 5, Page 162.

Bud No. 1: Book 5, Page 404.

Bud No. 2: Book 5, Page 405.

Bud No. 3: Book 5, Page 406.

Bud No. 4: Book 5, Page 407.

Bud No. 5: Book 5, Page 408.

Bud No. 6: Book 5, Page 409.

Bud No. 7: Book 5, Page 410.

Bud No. 8: Book 5, Page 411.

Bud No. 9: Book 5, Page 412.

Bud No. 10: Book 5, Page 413.

Bud No. 11: Book 5, Page 414.

Bud No. 12: Book 5, Page 415.

Bud No. 13: Book 5, Page 416.

Bud No. 14: Book 5, Page 417.

Bud No. 15: Book 5, Page 418.

Bud No. 16: Book 5, Page 419.

Bud No. 17: Book 5, Page 420.

Bud No. 18: Book 5, Page 421.

Bud No. 19: Book 5, Page 422.

Above all Quartz Locations.

## Placer Locations

Meadow Queen No. 1: Book 2, Page 334.

Meadow Queen No. 2: Book 2, Page 304.

Meadow Queen No. 3: Book 2, Page 303.

East Fork No. 1: Book 2, Page 333.

East Fork No. 2: Book 2, Page 332.

Defendant's Exhibit No. 4—(Continued)

East Fork No. 3: Book 2, Page 331.

East Fork No. 4: Book 2, Page 330.

East Fork No. 5: Book 2, Page 329.

Meadow Creek No. 1: Book 2, Page 328.

Meadow Creek No. 2: Book 2, Page 327.

Meadow Creek No. 3: Book 2, Page 326.

Meadow Creek No. 4: Book 2, Page 314.

Meadow Creek No. 5: Book 2, Page 313.

Meadow Creek No. 6: Book 2, Page 312.

Meadow Creek No. 7: Book 2, Page 310.

Meadow Creek No. 8: Book 2, Page 309.

Meadow Creek No. 9: Book 2, Page 308.

Meadow Creek No. 10: Book 2, Page 306.

Meadow Creek No. 11: Book 2, Page 305.

Meadow Creek No. 12: Book 2, Page 315.

Meadow Creek No. 13: Book 2, Page 316.

Meadow Creek No. 14: Book 2, Page 317.

Meadow Creek No. 15: Book 2, Page 319.

Meadow Creek No. 16: Book 2, Page 318.

Meadow Creek No. 17: Book 2, Page 325.

Meadow Creek No. 18: Book 2, Page 324.

Meadow Creek No. 19: Book 2, Page 323.

Meadow Creek No. 20: Book 2, Page 322.

Meadow Creek No. 21: Book 2, Page 321.

Placer Queen: Book 2, Page 320.

All of which records are hereby referred to for a more particular description of said mining claims, and,

Whereas, the party of the second part desires to take possession of, occupy, mine and operate the said mining claims and to secure an exclusive op-



## Defendant's Exhibit No. 4—(Continued)

tion to the right to purchase said mining claims, and the party of the first part is willing to grant, accord and agree to the same,

Now, therefore, for and in consideration of the premises and the sum of Ten and No/100 (\$10.00) Dollars, paid by the party of the second part, the receipt whereof by the party of the first part is hereby acknowledged, it is mutually covenanted, agreed and understood by and between the parties hereto as follows:

## I.

The party of the first part does hereby grant and accord unto the second party the exclusive right, privilege, and option to purchase all the right, title and interest of the party of the first part in and to said mining claims above named, together with all dips, spurs, and angles of all lode claims thereof, together with all other mining claims now owned by or that may hereafter be located or acquired by the first party during the existence of this contract within 1500 feet of the exterior limits of the aforesaid Cinnabar Group and Meadow Creek Group or within or adjacent or contiguous thereto, together with the tenements, hereditaments, and appurtenances and right and privileges thereunto belonging or in any wise appertaining and the personal property situate upon or in said claims, and belonging to said first party, and together with all millsites, water rights, tail races, tailing sites, and tailing dams or easements that are now owned by or may be acquired by first party for use in con-



## Defendant's Exhibit No. 4—(Continued)

nection with the above described claims or any of them for the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars, lawful money of the United States of America, (subject to the right of the party of the second part to discontinue this agreement and to be relieved from further obligations to proceed hereunder as set forth hereunder in Paragraph XII, hereof) said sums to be paid at the times and in the manner hereinafter mentioned, and such option to be subject at all times to the terms, covenants, and provisions hereinafter expressed.

## II.

## Manner of Payment

The purchase price for all of the interests of the party of the first part in and to said properties is to be paid by the second party by his depositing to the credit of party of the first part in the Crocker First National Bank of San Francisco, California, until the purchase price of One Million Five Hundred Thousand (\$1,500,000.00) Dollars is paid; royalties from all ores, bullion, and minerals mined or taken from said claims as follows:

First: During the period from the date that production starts as hereinafter defined, and or until second party shall have been repaid his investment in said property with interest at 8% per annum a royalty of 20% of the net proceeds from any and all ore from said property shipped, mined, milled or treated shall be paid by second party to said

## Defendant's Exhibit No. 4—(Continued)

Crocker First National Bank for the credit of the first party.

Second: Whenever second party shall have been repaid his investment in said properties together with interest thereon at 8% per annum, said second party shall pay to the first party a royalty of 50% of the net proceeds from any and all ore from said property shipped, mined, milled or treated after production starts, until the entire purchase price shall have been paid; said royalty to be paid by second party by his depositing the same in said Crocker First National Bank for credit of first party. It being understood and agreed by and between the parties hereto that production shall be deemed to have started whenever the party of the second part has erected and put in operation a reduction plant for handling quicksilver ore or reducing any of the ores from said properties; production shall also be deemed to have started whenever any commercial ore, bullion, metals or concentrates are taken from said properties.

## Net Proceeds

By the term "net proceeds" as used in this instrument, is meant and intended the difference between the cash received from the sale of ore, bullion, metals or concentrates mined from or produced upon said properties, and the actual cash cost of producing the same; provided, however, that by the words "actual cash cost" is meant only the actual expenses for labor, supplies, materials, fuel,

## Defendant's Exhibit No. 4—(Continued)

power and insurance and taxes required for mining, milling or for reducing and for transportation and marketing charges. Said royalties hereinbefore described to be paid party of first part, shall be deposited to the credit of the first party in said Bank on or before the 20th day of the month next succeeding the receipt of said proceeds by second party; the same to be paid each and every month after production starts, when there are any net proceeds as defined herein.

## III.

It is further agreed, that the party of the second part, or his representative or representatives, upon the signing of this agreement, shall have the right, to enter into the actual possession of the above described mining claims, and work in and on them for the purpose of conducting mining operations and mining, and developing thereon in a prudent and miner-like manner, and that from the date hereof, and during all the time this agreement shall continue in force and effect, the party of the second part shall be entitled to the sole and exclusive possession of said properties and premises, and may work, mine and develop the same as he may deem advisable, subject to the terms hereinafter in Article V, contained.

## IV.

It is further stipulated and agreed that all payments to be made under this agreement shall be made to the party of the first part in the banking

## Defendant's Exhibit No. 4—(Continued)

house in the Crocker First National Bank at San Francisco, California, which bank is also agreed to be the escrow holder of this agreement and all papers to be placed in escrow hereunder.

## V.

It is further stipulated and agreed that the party of the second part takes the possession of said property under this agreement, and acquires this option subject to the following terms and conditions, and the second party covenants and agrees:

(a) That he will go into the actual possession of said properties and commence bona fide development work thereon upon the signing of this agreement, and that during the year ending August 1st, 1928, and during each and every year thereafter he shall expend in developing, equipping and mining in and upon or for the benefit of said properties, the sum of Twenty-four Thousand (\$24,000.00) Dollars, subject to the provisions as to discontinuance and relief from the obligations to proceed further hereunder as set forth in Paragraph XII hereof, and that thereafter, during the life of this option he shall work and develop the same with an adequate force of men for economic mining, unless prevented by Acts of God, war, invasion, labor strikes, or other circumstances, acts or conditions beyond his control.

## Development Work

(b) That prior to the first day of May, 1938,



## Defendant's Exhibit No. 4—(Continued)

and of each and every year thereafter during the life of this agreement, he will perform development work on said mining claims, the same to be in such an amount and distributed over said groups so that each claim in said groups shall have at least \$100.00 worth of work performed for its benefit for the year ending July 1st, at 12:00 o'clock noon, 1928, and each and every year thereafter to the end that second party shall have fully performed all annual labor and assessment work now or hereafter required to be done by the laws of the State of Idaho and the United States; and the party of the second part shall, before the first of June, 1928, and before the first of June of each and every year thereafter, make, cause to be filed in the office of the County Recorder of Valley County, Idaho, on behalf of first party, the necessary proofs of annual labor or assessment work for said mining claims;

## Improvements Not Severable

(c) That he will not remove any machinery, buildings or other equipment now situate upon or used in connection with the above described mining claims, that he will keep the same in good condition, and repair, at his own expense, and he agrees that all improvements, made and buildings placed on or used in connection with or for said property shall become appurtenant to the said property, and in the event the said party of the second part does not complete the purchase of said property under the terms of this agreement, and in



## Defendant's Exhibit No. 4—(Continued)

case of termination, cancellation or forfeiture hereof or under; the said improvements of the buildings shall become the property of the party of the first part, provided, second party may remove severable machinery which he may install;

## No Liens Allowable

(d) That he will keep said property and the whole thereof, free and clear of all liens of whatsoever kind or character, and the party of the second part hereby covenants for himself, and his heirs, legal representatives, successors and assigns, to hold the party of the first part harmless from any and all liens and claims of whatsoever kind or nature, for wages, or supplies, or any indebtedness whatsoever created by said party of the second part by reason of his possession of, or his working of said claims that second party shall not be deemed or considered the agent of the first party under the provisions of the Statutes of Idaho relating to liens or otherwise, except for the performance by him of said annual assessment work;

## Notices to Be Posted

(e) That he will make the necessary affidavits and post and record the necessary notices to comply with the provisions of Section 2311 Idaho Compiled Statutes and the laws of the State of Idaho, so as to notify all persons that the operations to be carried on under this agreement shall at the sole cost and expense of the party of the second

## Defendant's Exhibit No. 4—(Continued)

part, and that the party of the first part shall not be responsible or liable in any way for the debts and obligations of the party of the second part, and that contracts for labor, supplies or material by party of the second part shall not bind the party of the first part or the above described mining property, or any part thereof, and that full compliance with the Statutes of the State of Idaho in regard to the making and filing and recording of the notices to effectuate this purpose shall be had immediately upon the party of the second part entering into the possession of said property;

## Work in Miner-like Manner

(f) That all the work done upon said mining claims during the existence of this agreement by said second party shall be done in a proper and miner-like manner and that all workable tunnels and raises now existing thereon, and all tunnels constructed thereunder, shall be kept open, passable, properly timbered, and in shape by second party, and that all stakes and monuments marking claims shall be kept up and marked.

(g) That upon the signing of this agreement the party of the second part will pay to the party of the first part or for its use and benefit the payroll of the party of the first part for the months of May, June and July, 1927, which said payroll amounts to the sum of \$2,147.75, as set forth in Exhibit "A" hereto attached.

## Defendant's Exhibit No. 4—(Continued)

## Taxes

(h) That he will pay, prior to delinquency all taxes of every kind and character that may be levied or assessed against said property for the year 1927, and thereafter during the life of this agreement.

(i) That on or before the first day of August, 1928, the said party of the second part shall pay to the said party of the first part or for its use and benefit, fifty (50%) per cent of the outstanding indebtedness of said party of the first part, the same being in the amounts and owing to the persons indicated in Exhibit "B" which is attached hereto, and that on or before the first day of February, 1929, shall pay the remainder of said indebtedness, provided, however, that on the payment of the said indebtedness or any part thereof, the party of the first part shall execute and deliver to the party of the second part its promissory note for the amount of said indebtedness so paid, the same to be in the following form:

\$..... Idaho ..... 19....

On or before ten years after date, for value received, the United Mercury Mines Company, a corporation promises to pay to the order of ..... at ....., ..... Dollars, in lawful money of the United States of America, with interest thereon in like lawful money from date until paid at the rate of eight per cent per annum, interest to be paid at maturity.

Defendant's Exhibit No. 4—(Continued)

And in case suit or action is instituted to collect this note or any part thereon, the maker promises to pay, besides the costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action.

United Mercury Mines Company, a Corporation.

.....

President.

Attest:

.....

Secretary.

VI.

Deed in Escrow

It is further understood and agreed that concurrently with the execution of this agreement the party of the first part will execute a good and sufficient deed or deeds granting and conveying all the right, title and interest of first party in and to said property and the whole thereof (except as against the paramount title of the United States) to the party of the second part, his heirs, and assigns, and that this said deed, together with a copy of this agreement shall be delivered to the Crocker First National Bank of San Francisco, California, in escrow; said deed to be delivered to the party of the second part upon the performance by him of all the terms and conditions of this agreement and the payment in full of the One Million Five Hundred Thousand (\$1,500,000.00) Dollars, hereinbefore specified. Upon the failure of the party



## Defendant's Exhibit No. 4—(Continued)

of the second part to perform any of the terms of this agreement by him to be performed, at the time and in the manner provided for in this agreement, the said Crocker First National Bank shall at once return said deed to the party of the first part.

## VII.

## Abstracts

It is further stipulated and agreed that within ninety days after written demand therefor, by the party of the second part to the party of the first part, the said party of the first part shall deliver to the Crocker First National Bank of San Francisco, California, for delivery to the party of the second part or his assigns, abstracts of title for the above described property. It is agreed that the party of the second part or his assigns, shall have a period of ninety (90) days after said abstracts are delivered to said Crocker First National Bank for the examination of said abstracts of title, and at, or before the end of said ninety days, shall deliver to the party of the first part a written opinion containing all material objections that said party of the second part may raise to the title (except the paramount right of the United States) of the party of the first part to said claims, and the party of the first part shall have ninety days within which to correct such material defects in said possessory right, unless, in order to correct such defects, it is necessary to bring suit or suits to quiet title, in which event a reasonable time shall



## Defendant's Exhibit No. 4—(Continued)

be allowed the party of the first part therefor, it being understood that the corrections of such defects are not precedent nor dependent conditions to the making of the payments and the performance of the conditions herein by the party of the second part to be kept and performed.

In the event second party shall fail to deliver written objections as, and within the time aforesaid, or if first party shall make corrections as aforesaid, the second party or his assigns shall be conclusively held to have accepted and approved the title as such, as first party hereunder has agreed, upon performance of this option to convey.

## VIII.

It is further agreed and understood, that there are certain claims of liens against said Hermes claim which are now in litigation, totaling not to exceed the sum of Sixty Thousand (\$60,000.00) Dollars, and which first party believes to be fraudulent and without foundation (the District Court of Valley County, Idaho, having already held one of said liens to be void and fraudulent) and said first party agrees to pay and discharge all of said liens, together with legal interest and costs of respective suits, when and if they are finally decided by the Supreme Court of Idaho to be valid; in order to protect its right to possession second party may pay any judgment against, or redeem such property from any sale under said liens and deduct the cost thereof from the next payment due from it thereafter.

## Defendant's Exhibit No. 4—(Continued)

## IX.

## New Claims

It is agreed that first party at all times during the existence of this contract, shall have free access to the above described properties for the purpose of inspecting said properties and making surveys, setting stakes and amending and making locations; that all amended locations made, as well as all locations of new claims, and of fractional claims within or upon the lands embraced in or within, fifteen hundred (1500) feet of the general exterior lines of the general group of claims above or within described, and all locations of millsites, power plants, sites and water rights made either by first or second party or his assigns, prior to delivery of conveyance hereunder, shall be made in the name of, and for, the party of the first part, and that all such new and amended locations shall be deemed and considered as included in this option and as part of the property to be conveyed to second party and no additional price shall be paid therefor, in case the payments hereinbefore described are made at the time and at the place and manner herein described; the party of the first part agrees that, upon the written demand of the party of the second part it will make and execute and place in escrow in said Crocker First National Bank of San Francisco, a deed or deeds covering and conveying all of said new locations and filings to the party of the second part, to be held by said bank subject to the terms and conditions of this option.

## Defendant's Exhibit No. 4—(Continued)

## X.

## Patents

Party of first part agrees that upon written demand of second party it will in its own name, apply for United States patent or patents for the above described mining claims, the same to be secured, however, at the expense of the second party.

## XI.

## Modification in Writing Waivers

It is further stipulated and agreed that no modification shall be of any force or effect or binding upon either or any of the parties hereto unless made in writing and signed by both parties hereto; and that the waiver by first party of any breach of any one or more covenants shall not be construed as a waiver of the breach of any covenant, nor of time as of the essence hereof.

## XII.

## Forfeiture

It is hereby expressly stipulated and agreed that this is an option contract and not a contract of purchase, and not a buy and sell agreement nor a contract of or to purchase, and that time is of the essence of this contract, and that in the event the party of the second part fails to perform the conditions of this agreement strictly according to the terms hereof, or fails to keep each and every covenant by him to be kept, then in that event, without demand or notice, all the right of the party

## Defendant's Exhibit No. 4—(Continued)

of the second part, and his assigns, shall at the option of the party of the first part, terminate, and all the payments and improvements which shall have been made by the party of the second part, or his assigns, and all buildings erected or used as hereinbefore provided, shall in such event be forfeited to the party of the first part, and that said payments and improvements shall be considered as liquidated damages, the manner of ascertaining the actual damages being difficult; provided, however, that in the event second party desires at any time to be relieved from further obligation to proceed under this agreement he shall give notice in writing to that effect by United States mail, postage prepaid, or by telegram to the party of the first part or shall serve upon first party at 605 Eastman Building, Boise, Idaho, and upon the Crocker First National Bank of San Francisco, California, a written notice of his intention not to proceed further under this agreement, and shall thereafter be relieved from all obligation to proceed under and from any and all liability on account of any omission thereafter, anything herein to the contrary notwithstanding; that said Crocker First National Bank of San Francisco, shall return the deed to first party herein provided for, and the same shall be null and void.

## XIII.

## Surrender of Possession

It is further stipulated and agreed that upon the



## Defendant's Exhibit No. 4—(Continued)

failure of the party of the second part to perform any terms or conditions of this contract he will at once surrender said premises to the party of first part.

## XIV.

## Inspection of Claims and Works

It is specifically agreed that during the existence of this contract, and during the time the party of the second part shall have the right to the possession of said property under this contract, the party of the first part, its agents and representatives shall have at all reasonable times, free access to said property and the whole thereof, for the purpose of inspecting the nature, character and quantity of work being performed by the party of the second part thereon, but such inspection shall be conducted in such manner as not to interfere with the work of the party of the second part.

## XV.

## Inspection of Books

Party of the second part hereby agrees to furnish all information including smelter returns, correspondence and bank statements which first party may require in order to assure it that it is receiving the amount of royalty or net proceeds of said property as herein provided for; second party further agrees to render to first party at Boise, Idaho, on the 20th day of each month, a statement which shall fully set forth the full particulars of the operations of the preceding month, and at the



## Defendant's Exhibit No. 4—(Continued)

same time making such purchase price payments as may then be due under the terms of this agreement, and the party of the first part, at reasonable times, or at least every six months, shall have access to the books of account of party of second part relating to the operation of said property for the purpose of inspection.

## XVI.

## Assignment

It is further expressly agreed and covenanted that this agreement is assignable by second party, and that this agreement, and all its terms and conditions shall be binding upon the heirs, successors, and assigns of both the parties hereto; provided, however, that in the event the second party makes an assignment of this option its assignee or assignees shall, by the taking of this agreement or or assignment, assume all obligations to be performed hereunder by the second party and thereupon second party shall notify first party in writing of such assignment giving the name and address of such assignee or assignees, and from and after the receipt of such notice by first party, second party shall be relieved from all liability on account of any act or omission on his part thereafter.

## XVII.

It is further stipulated and agreed that in the event the party of the second part decides that any of the claims hereinbefore described do not

Defendant's Exhibit No. 4—(Continued)  
have sufficient mineral to justify the development work or the doing of the annual assessment work thereon that such claims may be abandoned whenever first party consents thereto in writing, signed by the President and Secretary of the party of first part.

XVIII.

It is hereby specifically agreed that this agreement modifies, supersedes, and takes the place of all other agreements heretofore entered into between the parties hereto relative to the above described properties and that this agreement is to be construed without reference to any of said agreements.

UNITED MERCURY MINES  
COMPANY,

By J. J. OBERBILLIG,  
President.

(Corporate Seal)

Attest:

J. F. KOELSCH, Secretary.

Party of First Part.

F. W. BRADLEY,

Party of the Second Part.

## Defendant's Exhibit No. 4—(Continued)

## Exhibit A

## Payroll for Cinnabar Claim

## Labor for June

Name	Total	B. H. Charge	Amt.
M. Lee .....	120.00	37.50	157.50
E. D. Lake .....	120.00	37.50	157.50
M. B. Smith.....	150.00	37.50	187.50
Geo. Fenley .....	75.00	37.50	112.50
Jas. Feeny .....	76.00	23.75	99.75
Ed McBeth .....	76.00	23.75	99.75
			<hr/>
			814.50

## Meadow Creek Claim

Grant Drake .....	120.00	37.50	157.50
C. E. Kuhn .....	105.00	37.50	142.50
			<hr/>
			300.00

## Cinnabar Claim—Labor for July

James Feeney .....	102.00	31.87	133.87
Geo. Cowan .....	38.00	11.88	49.88
			<hr/>
			183.75

## Cinnabar Claim—Labor for May

M. Lee .....	124.00	38.75	162.75
E. D. Lake.....	64.00	17.75	81.75
M. B. Smith.....	145.00	36.25	181.25
Geo. Fenley .....	75.00	38.75	113.75
			<hr/>
			539.50

## Meadow Creek Claim

Grant Drake .....	124.00	38.75	162.75
C. E. Kuhn.....	108.50	38.75	147.25
			<hr/>
			310.00

Total, 2,147.75

Defendant's Exhibit No. 4—(Continued)

Exhibit B

United Mercury Mines Company, Dr.

To

Robert Lewis Estate.....	15,000.00
H. S. Levander.....	1,000.00
Hawley & Hawley.....	4,000.00
	<hr/>
	20,000.00

EXHIBIT "B"

July 5, 1928

Crocker First Federal Trust Company,  
N.W. Cor. Post and Montgomery Sts.,  
San Francisco, Calif.

Re: United Mercury - Bradley Escrow. Attention: Mr. Hannon.

Gentlemen:

Under date of August 20, 1927, the United Mercury Mines Company, an Idaho corporation, gave Crocker First National Bank of San Francisco, written instructions concerning the delivery to me and my assigns of a certain deed from it to me and my assigns, deposited in escrow with said letter, upon the performance by me or my assigns of certain conditions under the provisions of a written Agreement between said Mercury Mines Company and me, dated August 5, 1927; and certain addenda to said Agreement of August 5, 1927, dated February 1, 1928, and made a part of it, were afterwards executed by said Mercury Mines Company and delivered to you; and you are holding and managing the escrow thus created.

Thereafter, pursuant to the terms of said escrow instructions, there was delivered into said escrow

## Defendant's Exhibit No. 4—(Continued)

a deed of certain additional lands from said United Mercury Mines Company to me and my assigns, dated December 19, 1927.

Thereafter, pursuant to the terms of said escrow instructions, there was delivered into said escrow a deed of still other additional lands from said United Mercury Mines Company to me and my assigns, dated March 31, 1928.

I am now writing to notify you that all of my interest in and under said agreement between United Mercury Mines Company and myself, dated August 5, 1927, and in and under said addenda to said agreement added to and made a part thereof, dated February 1, 1928, has been acquired and is owned by Yellow Pine Company, a Calif. corporation, whose office address is 1022 Crocker Building, San Francisco, California, through assignments heretofore executed and caused to be executed by me; and I am herewith depositing into said escrow with you a deed of even date herewith from myself and my wife to said Yellow Pine Company, its successors and assigns, covering all three of the parcels of land set forth in said three separate deeds from said Mercury Mines Company to me, and you are instructed that the enclosed deed is delivered to you under the conditions contained in said written instructions of August 20, 1927, and is to be held in escrow by you until the payments named in the option shall have been made, or until this deed and the other deeds heretofore deposited are delivered to said Yellow Pine Company, as-



Defendant's Exhibit No. 4—(Continued)

signee, or are released, in accordance with the agreement contained in said instructions of Aug. 20, 1927.

Very sincerely,

/s/ F. W. BRADLEY.

San Francisco, California,

August 20th, 1927

Crocker First National Bank of San Francisco,  
San Francisco, California.

Gentlemen:

There is handed to you herewith a deed dated August 5, 1927, from United Mercury Mines Company, an Idaho corporation, conveying to F. W. Bradley, of San Francisco, California, his heirs and assigns, certain mining property located in the Yellow Pine Mining District, Valley County, State of Idaho.

When and if said F. W. Bradley, his heirs, executors or assigns, shall hereafter pay to you the aggregate total amount of One Million Five Hundred Thousand Dollars (\$1,500,000), you will deliver the enclosed deed to said F. W. Bradley, or to his order, or his heirs, executors or assigns, or their or either of their order. All moneys so paid to you, you will immediately place to the credit of said United Mercury Mines Company in your bank, and notify it at Boise, Idaho, of said credit or credits.

When and if said F. W. Bradley, his heirs, exec-

## Defendant's Exhibit No. 4—(Continued)

utors or assigns, shall at any time hereafter notify you in writing that he (or they) does not intend to proceed further under the agreement dated the 5th day of August, 1927, between said United Mercury Mines Company, party of the first part, and said F. W. Bradley, party of the second part, then you will, upon the receipt of said written notice, redeliver the said deed to the United Mercury Mines Company, or to its order.

In the event that a dispute shall hereafter arise between said United Mercury Mines Company, its successors or assigns, and said F. W. Bradley, his heirs, executors or assigns, over the delivery by you of the said deed, then and in that event you shall retain possession of the said deed until the said dispute is adjusted, or until you have been directed by final judgment of a court of competent jurisdiction with respect to the delivery thereof, and no liability of any kind or character shall attach to your Bank by reason of your failure to deliver said deed pending said dispute or the adjustment thereof, or pending litigation with respect to the delivery of said deed; provided, however, that if and when said F. W. Bradley, his heirs, executors or assigns shall have paid said sum of \$1,500,000.00, then said deed or deeds shall be delivered forthwith to him or them, anything herein to the contrary notwithstanding.

Any other deed or deeds from said United Mercury Mines Company to F. W. Bradley, which may be hereafter delivered to you, shall be held

Defendant's Exhibit No. 4—(Continued)  
or delivered by you in accordance with the foregoing terms and conditions.

Very truly yours,

[Seal]              UNITED MERCURY MINES  
                         COMPANY,

By J. J. OBERBILLIG,  
     Its President,

By J. F. KOELSCH,  
     Its Secretary,

[Seal]              F. W. BRADLEY,

Accepted: Crocker First National Bank of San  
                 Francisco,

By F. G. WILLIS,  
     Vice President.

### EXHIBIT C

Addenda to Agreement and Option Dated August  
5, 1927, Between The United Mercury Mines  
Company and F. W. Bradley Relating to the  
Cinnabar and Meadow Creek Groups of Lode  
Mining Claims.

This Agreement, Made and entered into this 1st  
day of February, 1928, at San Francisco, California, by and between the United Mercury Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, as party of the first part, and F. W. Bradley, of San Francisco, California, as party of the second part, Witnesseth:

## Defendant's Exhibit No. 4—(Continued)

That Whereas, the parties hereto did on or about the 5th day of August, 1927, enter into an option and agreement concerning and pertaining to the Cinnabar and Meadow Creek Groups of lode mining claims situate in Valley County, State of Idaho; and,

Whereas, in paragraph VII on pages 18 and 19 of said option agreement it was provided that the rights of second party should in certain contingencies be forfeited without demand or notice; and,

Whereas, it has been agreed by and between the parties to substitute in said option a new paragraph XII, which said paragraph shall provide for a notice to be given by first party to second party in the event it claims that said second party has failed to perform the covenants by him to be performed under said option.

Now, Therefore, for and in consideration of the premises and the continuation of development work on said claims by said second party, and in consideration of the sum of One (\$1.00) Dollar paid by the second party to the party of the first part, the receipt of which is hereby acknowledged, it is hereby stipulated and agreed as follows:

## I.

That paragraph XII on pages 18 and 19 of that certain option agreement, dated the 5th day of August, 1927, shall be amended to read as follows:

## Defendant's Exhibit No. 4—(Continued)

## Forfeiture

"It is hereby expressly stipulated and agreed that this is an option contract and not a contract to purchase, and not a buy and sell agreement, nor a contract of or to purchase, and that time is of the essence of this contract, and that in the event the party of the second part fails to perform the conditions of this agreement strictly according to the terms hereof, or fails to keep each and every covenant by him to be kept, and fails within 60 days after the receipt of notice and demand from first party to keep and perform any covenant herein by him to be kept and performed, then in that event, all the right of the party of the second part, and his assigns, shall at the option of the party of the first part, terminate, and all the payments and improvements which shall have been made by the party of the second part, or his assigns, and all buildings erected or used as hereinbefore provided shall in such event be forfeited to the party of the first part, and that said payments and improvements shall be considered as liquidated damages, the manner of ascertaining the actual damages being difficult, provided, however, that in the event second party desires at any time to be relieved further obligation to proceed under this agreement he shall give notice in writing to that effect by United States mail, postage prepaid, or by telegram to the party of the first part or shall serve upon first party at 605 Eastman Building, Boise, Idaho, and upon the Crocker First National Bank



## Defendant's Exhibit No. 4—(Continued)

of San Francisco, California, a written notice of his intention not to proceed further under this agreement, and shall, thereafter be relieved from all obligation to proceed under and from any and all liability on account of any omission thereafter, anything herein to the contrary notwithstanding; that said Crocker First National Bank of San Francisco, shall return the deed to first party herein provided for, and the same shall be null and void."

## II.

It is further stipulated and agreed that except for the above and foregoing modification of said paragraph XII as contained herein, the said option agreement has not, in any particular, been modified, changed or altered.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year in this agreement first above written.

[Seal]            UNITED MERCURY MINES  
                    COMPANY,  
By J. J. OBERBILLIG,  
                    President.

Attest:

J. F. KOELSCH, Secretary.  
Party of the First Part.

F. W. BRADLEY,  
Party of the Second Part.

Defendant's Exhibit No. 4—(Continued)

EXHIBIT D

Modification of Agreement and Option Dated August 5, 1927, Between The United Mercury Mines Company and The Yellow Pine Company, a Corporation, Relating to the Cinnabar and Meadow Creek Groups of Lode Mining Claims.

This Agreement, Made and entered into this 30th day of August, 1929, by and between the United Mercury Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, as party of the first part, and the Yellow Pine Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business in the State of Idaho, as party of the second part, Witnesseth:

That Whereas, The United Mercury Mines Company, a corporation, did on or about the 5th day of August, 1927, enter into an option and agreement with F. W. Bradley, which said option agreement pertained to the Cinnabar and Meadow Creek Groups of Lode Mining Claims situate in Valley County, State of Idaho;

And Whereas, Said contract has been assigned by the said F. W. Bradley to the Yellow Pine Company, a corporation;

And Whereas, The parties desire to modify the wording in Article II and Subdivision (a) of Article V of said agreement;

## Defendant's Exhibit No. 4—(Continued)

And Whereas, It has been agreed by and between the parties to substitute in said option a new Article II and a new Subdivision (a) of Article V.

Now, Therefore, For and in consideration of the premises and the continuation of the development of said claims by second party, and in consideration of the sum of One (\$1.00) Dollar, paid by the second party to the first party, the receipt of which is hereby acknowledged, it is hereby stipulated and agreed as follows, to-wit:

## I.

That Article II commencing on page 6 of said option and continuing on to page 8 of said option and agreement shall be amended to read as follows:

## II.

## Manner of Payment:

“The purchase price for all of the interests of the party of the first part in and to said properties is to be paid by the second party by his depositing to the credit of party of first part in the Crocker First National Bank of San Francisco, California, until the purchase price of One Million Five Hundred Thousand (\$1,500,000.00) Dollars is paid; royalties from all ores, bullion, and minerals mined or taken from said claims as follows:

First: During the period from the date that production starts as hereinafter defined, and/or until second party shall have been repaid his investment in said property with interest at 8% per

## Defendant's Exhibit No. 4—(Continued)

annum a royalty of 20% of the net proceeds from any and all ore from said property shipped, mined, milled or treated shall be paid by second party to said Crocker First National Bank for the credit of the first party.

Second: Whenever second party shall have been repaid his investment in said properties together with interest thereon at 8% per annum, said second party shall pay to the first party a royalty of 50% of the net proceeds from any and all ore from said property shipped, mined, milled or treated after production starts, until milled or treated after production starts, until the entire purchase price shall have been paid; said royalty to be paid by second party by his depositing the same in said Crocker First National Bank for credit of first party. It being understood and agreed by and between the parties hereto that production shall be deemed to have started whenever the party of the second part has erected and put in operation a reduction plant for handling quicksilver ore or reducing any of the ores from said properties; production shall also be deemed to have started whenever any commercial ore, bullion, metals or concentrates are taken from said properties.

## Net Proceeds:

By the term 'net proceeds' as used in this instrument, is meant and intended the difference between the cash received from the sale of ore, bullion, metals or concentrates mined from or produced upon

## Defendant's Exhibit No. 4—(Continued)

said properties, and the actual cash cost of producing the same; provided, however, that by the words 'actual cash cost' is meant only the actual expenses for labor, supplies, materials, fuel, power and insurance and taxes required for mining, milling or for reducing and for transportation and marketing charges. Said royalties hereinbefore described to be paid party of first part, shall be deposited to the credit of the first party in said Bank on or before the 20th day of the month next succeeding the receipt of said proceeds by second party; the same to be paid each and every month after production starts, when there are any net proceeds as defined herein.

## Development May Be In Several Units:

It is understood and agreed that the said properties may be developed by second party in what is commonly called a two-stage development, and the party of the second part may proceed and build a mill of approximately 150 ton daily capacity, and at a later time build a mill or mills and other works of greater capacity and that the said second mill or mills and works in connection therewith when so constructed by said party of the second part shall be considered as a part of the investment of the party of the second part in determining whether or not under this agreement a royalty of 20% or of 50% shall be paid."

## II.

That Subdivision (a) of Article V on pages 9



Defendant's Exhibit No. 4—(Continued)  
and 10 of said option agreement shall be amended  
to read as follows:

“(a) That he will go into the actual possession of said properties and commence bona fide development work thereon upon the signing of this agreement, and that during the year ending August 1st, 1928, and during each and every year thereafter he shall expend in developing, equipping and mining in and upon or for the benefit of said properties, the sum of at least Twenty-four Thousand (\$24,000.00) Dollars, subject to the provisions as to discontinuance and relief from the obligations to proceed further hereunder as set forth in Paragraph XII hereof, and that thereafter, during the life of this option, he shall work and develop the same with an adequate force of men for economic mining, unless prevented by Acts of God, war, invasion, labor strikes, or other circumstances, acts or conditions beyond his control.”

### III.

It is further stipulated and agreed that except for the above and foregoing modification of said paragraphs as herein contained, the said option agreement has not by this instrument in any particular been amended, changed or altered; it being understood that Paragraph XII of said original option was amended by an addenda dated February 1, 1927.

In Witness Whereof, The parties hereto have

Defendant's Exhibit No. 4—(Continued)  
hereunto set their hands and seals the day and year  
in this agreement first above written.

[Seal] UNITED MERCURY MINES  
COMPANY,

By J. J. OBERBILLIG,  
President.

Attest:

J. F. KOELSCH, Secretary.  
Party of the First Part.

[Seal] YELLOW PINE COMPANY,  
By F. W. BRADLEY,  
President.

Attest:

E. A. GRIFFEN, Secretary.  
Party of the Second Part.

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DEFENDANT'S EXHIBIT No. 5  
(Copy)

OPTION AGREEMENT

This Agreement, Made and entered into this 16th day of May, 1939, by and between the United Mercury Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, as party of the first part, hereinafter called the Optionor, and the Bradley Mining Co., a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business in the State of Idaho, the party of the second part, hereinafter called the Optionee, Witnesseth:

Defendant's Exhibit No. 5—(Continued)  
Description of Claims

That Whereas, the Optionor is the owner (except as against the paramount title of the United States) of two groups of lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, the first of said groups being commonly known as the Meadow Creek Group, and the second of said groups being commonly known as the Cinnabar Group, comprising lode and placer claims and comprising the following named mining claims, the notices of location of which are of record in the office of the County Recorder of Valley County, State of Idaho, at the book and page number herein stated, to-wit:

## Meadow Creek

Meadow Creek No. 1—Patented Book 4, Quartz, Page 118.

Meadow Creek No. 2—Patented Book 4, Quartz, Page 118.

(Balance of description has not been copied.)

Also the mining claims, grounds and lands situate in the Yellow Pine Mining District in Valley County, State of Idaho, to-wit:

Name of Claim: Hennessy No. 1; quartz locations: Book 5, Page 157.

Name of Claim: Hennessy No. 2; quartz locations: Book 5, Page 158.

(Balance has not been copied.)

Page 6

and also all that portion of the Homestake, the

## Defendant's Exhibit No. 5—(Continued)

notice of location of which is of record in the office of the County Recorder of Valley County, Idaho, in Book 5 of Quartz locations at page 350, and all that portion of the Homestake No. 2, notice of location of which is of record in the office of the County Recorder of Valley County, Idaho, in Book 5 of Quartz Locations at page 472, lying South of the line hereinafter described, all of which records are hereby referred to for a more particular description of said claims.

Together with an easement for a Tailing pond or ponds, and a right of way for a ditch conveying the waters of Sugar Creek through a by-pass, and the right to enter upon the hereinafter described lands for the purpose of diverting the waters of Sugar Creek through a by-pass and maintaining and operating a Tailing pond upon the following described lands situate in Valley County, State of Idaho, to-wit:

Said easements being in, over and upon a tract of land situate in the Yellow Pine Mining District in Valley County, Idaho, the southerly boundary of which is described (Balance of description has not been copied).

## Page 7—Meadow Creek Group

Optionee to have the right to build a dam or dams, a road or roads, the right to ingress to and egress from said lands, and the whole thereof, and to flood and deposit tailings upon said lands, and the whole thereof; provided, however, that if Op-

Defendant's Exhibit No. 5—(Continued)

tionee floods or destroys the present road which is along the north side of Sugar Creek, Optionee shall construct a new road in the place thereof, having the same passability as the present road and provided, further, that Optionee shall not dump or impound tailings on the Hennessy Extension and Homestake No. 3 lode mining claims as the same are now located on the ground; provided, further, that the Antimony Gold Ores Company, a corporation, its successors and assigns, shall have the right to dump tailings on any portion of the ground embraced in said easement; provided, further, that Optionee shall not by-pass Sugar Creek at a point northeasterly of the northeasterly end line of the Midway No. 19 lode mining claim.

Page 8

The above line used in describing the easements hereinbefore mentioned is the northerly boundary line of the said Meadow Creek Group.

Cinnabar Group

Flyer: Amended, Book 6, Quartz, Page 75.

Emerald No. 1: Original, Book 3, Quartz, Page 396.

(Balance has not been copied.)

Page 10

All of which records are hereby referred to for a more particular description of said claims.

Page 11

And Whereas, the United Mercury Mines Com-



## Defendant's Exhibit No. 5—(Continued)

pany, a corporation, did on or about the 5th day of August, 1927, enter into an option agreement with F. W. Bradley of San Francisco, which said option agreement pertained to the said Cinnabar and Meadow Creek Groups of lode and placer claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, said option contract having been assigned by said F. W. Bradley to the Yellow Pine Company, a corporation;

And Whereas, the party of the second part went into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than Twenty-four Thousand Dollars (\$24,000.00);

And Whereas, the party of the second part has in accordance with the provisions of said option agreement dated August 5th, 1927, performed the necessary annual assessment work during each and every year from the date of said option agreement;

And Whereas, the party of the second part did, upon signing and in accordance with the said option agreement dated August 5th, 1927, pay unto the said first party or for its use and benefit the sum of Two Thousand One Hundred Forty-seven and 75/100 Dollars (\$2,147.75).

And Whereas, the party of the second part did

Defendant's Exhibit No. 5—(Continued)

pay to the said first party, or for its use and benefit, the sum of Ten Thousand Dollars (\$10,000.00) on or before the first day of August, 1928, and also the sum of Ten Thousand Dollars (\$10,000.00) on or before the first day of February, 1929, in accordance with the provisions of said option agreement dated August 5th, 1927;

And Whereas, the party of the second part has in each and every other respect complied with all the terms and conditions of said option agreement dated August 5th, 1927, from the date thereof;

And Whereas, the said United Mercury Mines Company, a corporation, and the said Yellow Pine Company, a corporation, did by a supplemental agreement entitled "Addenda to Agreement and Option dated August 5th, 1927, between The United Mercury Mines Company and F. W. Bradley Relating to the Cinnabar and Meadow Creek Groups of Lode Mining Claims," and dated the first day of February, 1928, further modify and change certain parts of said option contract dated the 5th day of August, 1927;

And Whereas, the said option contract dated August 5th, 1927, was further modified and changed in certain parts by a supplemental agreement dated the 30th day of August, 1929, by and between the said United Mercury Mines Company, a corporation, and the said Yellow Pine Company, a corporation;

And Whereas, the said United Mercury Mines Company, [Page 13] a corporation, and the said

## Defendant's Exhibit No. 5—(Continued)

Yellow Pine Company, a corporation, desire, each for itself, further changes, additions and modifications in and to said option agreement dated August 5th, 1927;

And Whereas, on or about the 3rd day of October 1930, the United Mercury Mines Company and the Yellow Pine Company entered into a new agreement which merged within its terms and conditions all prior agreements hereinbefore referred to;

And Whereas, subsequent to said agreement on October 3, 1930, the Yellow Pine Company and its successor in interest, the Bradley Mining Co., acquired a group of mining claims known as the Hennessy Group, which said group of claims was acquired with the understanding and agreement that it would become a part of the Meadow Creek Group of lode mining claims and to be owned by the United Mercury Mines Company until the acquisition of the entire Meadow Creek Group by the Yellow Pine Company;

And Whereas, the Bradley Mining Co. has, or upon the execution and delivery of this instrument will, deliver to the United Mercury Mines Company a deed to certain claims out of said Hennessy Group of mining claims;

And Whereas, said Yellow Pine Company has assigned all of its interests in said Meadow Creek Group of lode mining claims and all its right, title and interest in and to the option hereinbefore mentioned to the Bradley Mining Co., a corporation;

Defendant's Exhibit No. 5—(Continued)

Page 14

And Whereas, the said United Mercury Mining Company, a corporation, and the said Bradley Mining Co., a corporation, further desire to enter into a new option agreement, which said agreement shall finally express the understanding and agreement between the parties hereto;

And Whereas, the Optionor is willing to give to the Optionee an option to purchase the two groups of claims above described under the terms and conditions herein contained, and the Optionee is willing to take an option to purchase said groups of mining claims under the terms and conditions herein expressed;

Now, Therefore, for and in consideration of the premises and the mutual covenants herein contained, and for the sum of Five Hundred Fifty-one and 46/100 Dollars (\$551.46) paid by the Optionee to the Optionor, the receipt whereof by the Optionor is hereby acknowledged, it is mutually covenanted, agreed and understood by and between the parties hereto as follows, to-wit:

## I.

## Merger of Negotiations

It is hereby specifically understood and agreed that this instrument of option contract and agreement rescinds, nullifies, supersedes, and takes and place of all other contracts and agreements of every kind and character between the parties hereto and between the Optionor and Fred W. Bradley and the



## Defendant's Exhibit No. 5—(Continued)

Yellow Pine Mining Company, and that all such prior contracts and all negotiations [Page 15] between the parties hereto relative to the hereinbefore described properties, whether written or oral, of any kind or character, are merged herein, and that this agreement is to be construed without reference to any of said former agreements or negotiations.

## II.

## Severable Options

It is understood and agreed by and between the parties hereto, as between the parties hereto, their successors and assigns, that severable options are herein given by the Optionor to the Optionee for the two groups of mining claims hereinbefore described, and that the Optionee may elect to take and pay for the said Meadow Creek Group of mining claims as hereinbefore described without being compelled to take and pay for the said Cinnabar Group.

## III.

## Options Given

The said Optionor does hereby grant and accord unto the Optionee the sole and exclusive right, privilege and option to purchase all the right, title and interest of the Optionor in and to the following:

(a) Said Meadow Creek Group of lode mining claims and the said Cinnabar Group of lode mining claims hereinbefore described;

(b) Together with all dips, spurs and angles of all lodes located therein;



Defendant's Exhibit No. 5—(Continued)

(c) Together with all other mining claims now owned by or that may hereafter be located or acquired by said Optionor during the life of this agreement within 1500 linear feet of the extreme exterior boundaries of said [Page 16] Meadow Creek and Cinnabar Groups of lode mining claims, or within, or adjacent, or contiguous thereto;

(d) Together with the tenements, hereditaments and appurtenances and rights and privileges thereunto belonging or in anywise appertaining;

(e) Together with the personal property belonging to said Optionor situate upon said mining claims;

(f) Together with all millsites, water rights, tail races, tailing sites, and tailing dams or easements that are now owned or may in the future be acquired by said Optionor for use in connection with said claims, or any of them.

The purchase price for said Meadow Creek Group of lode mining claims to be the sum of Nine Hundred Thousand Dollars (\$900,000.00), lawful money of the United States of America, said sum to be paid (subject to the right of the Optionee to discontinue this agreement and to be relieved from further obligations to proceed hereunder as set forth in Paragraph XV hereof) at the times and in the manner hereinafter provided, the said option to be subject at all times to the terms, conditions and provisions hereinafter expressed.

## Defendant's Exhibit No. 5—(Continued)

## Purchase Price

The purchase price for the Cinnabar Group of lode mining claims shall be the sum of Six Hundred Thousand Dollars (\$600,000.00), lawful money of the United States of America, in addition to the \$900,000.00 for the Meadow Creek Group, said sum to be paid (subject to the right of the Optionee to discontinue this agreement and [Page 17] to be relieved from further obligations to proceed hereunder as set forth in Paragraph XV hereof) at the times and in the manner hereinafter provided, the said option to be subject at all times to the terms, conditions and provisions hereinafter expressed.

## IV.

The said Optionor does hereby give, grant and accord unto the Optionee, or its representative or representatives, the sole and exclusive option, privilege and right to enter in and upon and to continue with the actual possession of said mining claims and work in and on them for the purpose of developing, equipping, and extracting ores or metals or values from said claims, and in the manner and to the extent and at such places as may, in the judgment of said optionee, be best suited to the best interests of both parties hereto; said option, however, to be subject at all times to the terms, covenants and provisions hereinafter expressed.

## V.

## Development Work

The Optionee hereby agrees, in the event it con-

## Defendant's Exhibit No. 5—(Continued)

tinues to exercise its rights under this option, to do and perform (subject always to the right of the Optionee to discontinue this agreement and to be relieved from any further obligation to proceed hereunder as set forth in Paragraph XV hereof) the following:

(a) To perform and complete upon, or in or for the benefit of said Meadow Creek Group of mining claims, prior to the first day of May of each and every year that said Optionee remains in or is entitled to the possession [Page 18] of said Meadow Creek Group under the terms of this agreement, the necessary annual assessment work to hold and protect said claims under the mining laws of the United States and the State of Idaho, and to file and record, on or before the first day of June of each and every year during the occupation of said premises by said Optionee under the provisions of this agreement, in the office of the County Recorder of Valley County, State of Idaho, on behalf of Optionor, the necessary proofs of such annual labor or assessment work upon said Meadow Creek Group of mining claims. Optionee agrees to file proofs of annual assessment work for said Cinnabar Group insofar as the work done on the Meadow Creek Group is applicable thereto, the Optionee to have the discretion in determining what work is applicable to said Cinnabar Group.

(b) To spend in, upon, and for the benefit of or on account of said properties, annually during the life of this agreement, the sum of at least Twenty

## Defendant's Exhibit No. 5—(Continued)

Five Thousand Dollars (\$25,000.00), said sum to include, but not necessarily in addition to, such sums required for the annual assessment work provided in sub-paragraph (a) immediately preceding, it being understood that the places where and the manner in which the said sum shall be expended shall be in the sole discretion of the Optionee, and that if said sum spent can be applied as assessment work on said claims it shall not be necessary for Optionee to perform other or additional assessment work.

## Page 19

(c) To pay to the Optionor, at the times and in the manner hereinafter provided, the following royalties upon all ores, metals or values extracted from the mining grounds included in this option during the periods hereinafter named;

First: For the period from August 1st, 1939, and ending at midnight, July 31st, 1944, a royalty of seven and one-half per cent ( $7\frac{1}{2}\%$ ) upon all net smelter, or mint returns, or net revenues, as defined herein, on all concentrates, metals, ores and values extracted from said optioned mining claims;

Second: For the period beginning August 1st, 1944, and ending at midnight, July 31st, 1949, a royalty of ten per cent (10%) upon all net smelter, or mint returns, or net revenues as defined herein on all concentrates, metals, ores and values extracted from said optioned mining claims;

Third: For the period beginning August 1st,



## Defendant's Exhibit No. 5—(Continued)

1949, and thereafter, a royalty of twelve and one-half per cent ( $12\frac{1}{2}\%$ ) upon all net smelter, or mint returns, or net revenues, as defined herein, on all concentrates, metals, ores and values extracted from said optioned mining claims.

## Manner of Payment

The said royalties shall be deposited by Optionee in the Crocker First National Bank of San Francisco, California, to and for the credit and order of said Optionor, on or before the twentieth (20th) day of the calendar month next succeeding the receipt of said net [Page 20] returns by Optionee, and the same to be so paid each and every month when there are any net smelter or mint or other returns until the purchase price of said mining claims and properties has been completed as herein provided. It is agreed that concentrates cannot be hauled from the property during the late fall, winter and early spring months, and that the time when the same shall be shipped during the summer months shall be determined by Optionee. It is understood, however, that should local reduction of the concentrates become practicable as determined by the Optionee, that no concentrates will be shipped.

## Certain Terms Defined

By net smelter returns, as used herein, is meant the amount received from the smelter from any ores, concentrates, metals, or values shipped to a smelter, it being understood that the smelter will



## Defendant's Exhibit No. 5—(Continued)

deduct its normal smelting charges, and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped less marketing and shipping costs from Cascade, Idaho.

By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.

It is agreed that in addition to the deduction of railroad freight from Cascade, Idaho, to the smelter, [Page 21] that Optionee shall also be allowed to deduct from the net smelter returns Two dollars and Fifty Cents (\$2.50) per ton for each ton of concentrates, ores, metals or values hauled from the above described property, the said sum to be deducted from the net smelter returns before net royalty herein provided for is computed. It is also agreed that in the event that concentrates are shipped by truck to a smelter, there shall be deducted from net smelter returns the amount for trucking that it would have cost to ship the same by railroad from Cascade, Idaho, to the smelter to which the same are trucked.

It is understood and agreed that when the sum of Nine Hundred Thousand Dollars (\$900,000.00) shall have been paid by the Optionee to the Optionor then, and in that event, the escrow holders herein named shall deliver to the Optionee the

Defendant's Exhibit No. 5—(Continued)  
deeds and title papers deposited with said escrow holder under the terms hereof for the above and foregoing described Meadow Creek Group.

(d) The Optionee will not remove any building or other like structure now situate upon or used in connection with the hereinbefore described properties, and it will keep the same in good condition and repair it at its own expense, and the Optionee also agrees that all improvements made and buildings placed upon said premises shall be appurtenant thereto, and in the event that the Optionee does not complete the purchase of said mining properties under the terms of this agreement, and in case [Page 22] of termination, cancellation or forfeiture hereof or hereunder, the said improvements and buildings shall become the property of the Optionor, provided, the Optionee may remove severable machinery, such as ball mills, flotation cells, generators, motors, roasters, transformers, transmission lines, and compressors, and supplies installed or placed upon said property by said Optionee or its predecessors since 1927.

#### No Liens Allowable

(e) The Optionee will keep the properties, and the whole thereof, free and clear of all liens of whatsoever kind or character, and the Optionee hereby covenants for itself, and its successors and assigns, to hold the Optionor harmless from any and all liens and claims of whatsoever kind or nature for wages or supplies, or any indebtedness

## Defendant's Exhibit No. 5—(Continued)

whatsoever created by Optionee by reason of its possession of or its working of said claims. The Optionee shall not be deemed or considered the agent of said Optionor under the provisions of the statutes of Idaho relating to liens, or otherwise, except for the performance by Optionee of said annual assessment work.

## Notices to Be Posted

(f) The Optionee will make the necessary affidavits and post and record the necessary notices to comply with the provisions of Sections 43-401 to 43-403, Idaho Code Annotated, 1932 Official Edition, so as to notify all persons that the operations to be carried on under this agreement shall be at the sole cost and expense of the Optionee, and that the Optionor shall not be responsible [Page 23] or liable in any way for the debts and obligations of the Optionee, and that contracts for labor, supplies and materials by the Optionee shall not bind the Optionor or the hereinbefore described mining properties, or any part thereof, and that full compliance with the statutes of the State of Idaho in regard to the making and filing and recording of the notices to effectuate this purpose shall be had immediately upon the execution of this agreement.

## Work In Miner Like Manner

(g) To perform all work done upon said Meadow Creek Group of mining claims during the existence of this agreement in a proper and miner-like man-

## Defendant's Exhibit No. 5—(Continued)

ner, and that all reasonable efforts shall be made by Optionee to keep up and work all stakes and monuments.

## Taxes

(h) To pay, prior to delinquency, all taxes of every kind and character that may be levied or assessed against said property during the life of this agreement; provided, however, that if in the future a bullion or severance tax is levied or imposed, Optionee shall not be obligated to pay the same on the royalty share to which the Optionor is entitled.

(i) Optionee agrees that it will proceed, as soon as practicable, to enlarge the present mill situate on said Meadow Creek Group to a capacity of approximately three hundred (300) tons per day, the exact time of the completion of said enlargement to be left to the discretion of Optionee.

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## VI.

The said Optionor does hereby covenant and agree with the said Optionee to do and perform the following things concurrently with the execution of this agreement, to-wit:

## Deed In Escrow

(a) To execute a good and sufficient deed or deeds, granting and conveying to Optionee all the right, title and interest of the said Optionor in and to the Meadow Creek Group as hereinbefore described, and the whole thereof (except as against the



## Defendant's Exhibit No. 5—(Continued)

paramount title of the United States of America), together with the buildings and improvements situate in or upon or appertaining to said Meadow Creek Group of mining claims, and to deposit the same in escrow with the Crocker First National Bank of San Francisco, California, with appropriate instructions to said bank to deliver said deed or deeds to the said Optionee upon the performance by it of all the terms and conditions of this agreement and the payment in full as herein provided of the sum of Nine Hundred Thousand Dollars (\$900,000.00).

(b) To execute a good and sufficient deed or deeds, granting and conveying to the said Optionee all the right, title and interest of the said Optionor in and to said Cinnabar Group of lode mining claims as hereinbefore described, and the whole thereof (except as against the paramount title of United States of America), together with the improvements and buildings situate in or upon or appertaining to said Cinnabar Group of mining claims, and to deposit in escrow with the [Page 25] Crocker First National Bank of San Francisco, California, the said deed or deeds, with appropriate instructions to said bank to deliver said deed or deeds for said Cinnabar Group to the Optionee upon the performance by it of all the terms and conditions of this agreement and the payment in full therefor by said Optionee of the sum of Six Hundred Thousand Dollars (\$600,000.00), the same to be in addition to the sum of Nine Hundred Thousand



Defendant's Exhibit No. 5—(Continued)  
Dollars (\$900,000.00) herein provided for as the purchase price for the said Meadow Creek Group.

(c) To execute and acknowledge such statement or statements as may be desired by the said Optionee to be recorded in the office of the County Recorder of Valley County, Idaho, showing the giving of the hereinbefore described options.

## VII.

The said Optionor does further covenant and agree, to-wit:

(a) Upon the demand of the Optionee to make and execute and place in escrow with the said Crocker First National Bank of San Francisco, California, any further deeds, instruments, conveyances or writings of whatsoever character that may be required by said Optionee in order to convey all the right, title and interest of said Optionor in and to said groups of claims and any and all claims that may hereafter be purchased or located by the Optionor within the exterior boundaries of said [Page 26] Meadow Creek Group or within the exterior boundaries of said Cinnabar Group, or within 1500 feet of the exterior limits thereof, including all appurtenances as are enumerated in subdivisions (b) to (f) inclusive, of paragraph III hereof.

## VIII.

It is further stipulated and agreed by and between the parties hereto that the purchase price for said Meadow Creek Group shall be the sum of

Defendant's Exhibit No. 5—(Continued)

Nine Hundred Thousand Dollars (\$900,000.00) and the purchase price for said Cinnabar Group shall be the sum of Six Hundred Thousand Dollars (\$600,000.00).

### IX.

#### Payment a Condition Precedent to Delivery

It is further stipulated and agreed that the payment of said purchase price is a condition precedent to the delivery of any deed or deeds for said properties, and that the deed or deeds for the mining claims and properties shall be delivered to the Optionee upon the payment to the Optionor as follows:

(a) That the deed or deeds for said Meadow Creek Group shall be delivered when Optionee shall have paid to the Optionor the sum of Nine Hundred Thousand Dollars (\$900,000.00);

(b) That the deed or deeds for the said Cinnabar Group shall be delivered to the Optionee when the total purchase price of Nine Hundred Thousand Dollars (\$900,000.00) for the Meadow Creek Group and Six Hundred [Page 27] Thousand Dollars (\$600,000.00) for the Cinnabar Group, amounting to a total purchase price of One Million Five Hundred Thousand Dollars (\$1,500,000.00) shall be paid to the Optionor as herein provided.

### X.

It is further stipulated and agreed that all royalties herein provided for shall be applied and con-

Defendant's Exhibit No. 5—(Continued)  
stitute a part payment of the purchase price herein provided for.

## XI.

### Abstracts

It is further stipulated and agreed that within ninety (90) days after written demand therefor by the Optionee made on the Optionor, the Optionor shall deliver to the Crocker First National Bank of San Francisco, California, for delivery to Optionee, or its assigns, abstracts of title for the above described Meadow Creek Group. It is agreed that the Optionee, or its assigns, shall have a period of ninety (90) days after said abstracts are delivered to said Crocker First National Bank for the examination of said abstracts of title and at or before the end of said ninety (90) days shall deliver to Optionor a written opinion containing all material objections that the said Optionee may raise to the title (except the paramount right of the United States) of the Optionor to said claims, and the Optionor shall have ninety (90) days within which to correct such material defects in said possessory right, unless, in order to correct such defects it is necessary to bring suit or [Page 28] suits to quiet title, in which event a reasonable time shall be allowed the Optionor therefor, it being understood that the corrections of such defects are not conditions precedent or dependent conditions to the making of the payments and the performance of the conditions herein by the Optionee to be kept and performed.

## Defendant's Exhibit No. 5—(Continued)

In the event Optionee shall fail to deliver written objections as and within the time aforesaid, or if Optionor shall make corrections as aforesaid, the Optionee, or its assigns, shall be conclusively held to have accepted and approved such title as Optionor has agreed to convey upon the performance of this option by Optionee.

## XII.

## New Claims

It is agreed that Optionor at all times during the existence of this contract shall have free access to the above described properties for the purpose of inspecting said properties and making surveys, setting stakes and amending and making locations; that all amended locations made, as well as all locations or purchases of new claims and of fractional claims, within or upon the lands embraced in or within fifteen hundred (1500) feet of the general exterior lines of the general groups of claims above or within described, and all purchases and locations of mill sites, power plants, sites and water rights made either by Optionor or Optionee, or its assigns, prior to delivery of conveyance hereunder, shall be made in the name of and for the Optionor, and that all such new and amended locations shall be deemed and considered as included in this option and as part of the property to be conveyed to Optionee and no additional price shall be paid therefor, in case the payments hereinbefore described are made at the time and at the place and

Defendant's Exhibit No. 5—(Continued)  
in the manner herein described. The Optionor agrees that, upon the written demand of the Optionee, it will make and execute and place in escrow in said Crocker First National Bank of San Francisco, California, a deed or deeds covering and conveying all of said new locations and filings to the Optionee, to be held by said bank subject to the terms and conditions of this option.

### XIII.

#### Patents

The Optionor agrees that upon the written demand of the Optionee it will, in its own name, apply for a United States Patent or Patents for the above described mining claims, or any part thereof, the same to be secured, however, at the expense of the Optionee.

### XIV.

#### Modification In Writing. Waivers

It is further stipulated and agreed that no modification shall be of any force or effect or binding upon either or any of the parties hereto unless made in writing and signed by both parties hereto; and that the waiver by Optionor of any breach of any one or more covenants shall not be construed as a waiver of the breach of any covenant, nor of time as of the essence hereof.

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### XV.

#### Forfeiture

It is expressly stipulated and agreed that this is



## Defendant's Exhibit No. 5—(Continued)

an option contract and not a contract of purchase, and not a buy and sell agreement, nor a contract of or to purchase, and that time is of the essence of this contract, and that in the event the Optionee fails to perform the conditions of this agreement strictly according to the terms hereof, or fails to keep each and every covenant by it to be kept, and fails within sixty (60) days after the receipt of written notice and demand from Optionor, sent by registered mail to Optionee, addressed to it at 922 Crocker Building, San Francisco, California, to keep and perform any covenant herein by it to be kept and performed, then, and in that event, all the right of the Optionee, and its assigns, shall at the option of the Optionor terminate, and all the payments and improvements which shall have been made by the Optionee, or its assigns, and all buildings erected or used as hereinbefore provided, shall in such event be forfeited to the Optionor, and that said payments and improvements shall be considered as liquidated damages, the manner of ascertaining the actual damages being difficult, and it is agreed that forfeiture as herein provided and the right to sue for the recovery of royalties shall be the sole remedies of the Optionor, provided, however, that in the event Optionee desires at any time to be relieved from further obligation to proceed under this agreement it shall give notice in writing to that effect by registered United States mail, to the Optionor, [Page 31] or shall serve upon Optionor at 258 Sonna Building, Boise, Idaho, and

Defendant's Exhibit No. 5—(Continued)  
also registering a copy thereof to Hawley & Worthwine, 610 Eastman Building, Boise, Idaho, and upon the Crocker First National Bank of San Francisco, California, a written notice of its intention not to proceed further under this agreement, and shall thereafter be relieved from all obligation to proceed hereunder, and from any and all liability on account of any omission thereafter, anything to the contrary herein notwithstanding; that said Crocker First National Bank of San Francisco shall return the deed to Optionor herein provided for, and the same shall be null and void.

## XVI.

### Surrender of Possession

It is further stipulated and agreed that upon the failure of the Optionee to perform any terms or conditions of this contract within sixty (60) days after notice so to do as herein provided, it will, upon the demand of the Optionor, at once surrender said premises to the Optionor.

## XVII.

### Inspection of Claims and Work

It is specifically agreed that during the existence of this contract, and during the time the Optionee shall have the right to the possession of said property under this contract, the Optionor, its agents and representatives, shall have at all reasonable times free access to [Page 32] said property, and the whole thereof, for the purpose of inspecting the

## Defendant's Exhibit No. 5—(Continued)

nature, character and quantity of work being performed by the Optionee thereon, but such inspection shall be conducted in such manner as not to interfere with the work of the Optionee.

## XVIII.

## Inspection of Books

The Optionee hereby agrees to furnish all information, including smelter returns, correspondence and bank statements, which Optionor may require in order to assure it that it is receiving the amount of royalty or net proceeds of said property as herein provided for. Optionee further agrees to render to Optionor at Boise, Idaho, on or before the 25th day of each month, a statement which will fully set forth the estimate of net smelter returns of the preceding month, and at the same time making such purchase price payments as may then be due under the terms of this agreement, and the Optionor, at reasonable times, or at least every six months, shall have access to the books of account of the Optionee relating to the operation of said property for the purpose of inspection.

## XIX.

## Assignment

It is further expressly agreed and covenanted that this agreement is assignable by Optionee, and that this agreement and all its terms and conditions shall be binding upon the heirs, successors and assigns of both the parties hereto; provided, however,

Defendant's Exhibit No. 5—(Continued)  
that in the event the Optionee makes an assignment of this option, its assignee or assignees shall, by the taking of this agreement or [Page 33] assignment, assume all obligations to be performed hereunder by the Optionee, and thereupon the Optionee shall notify the Optionor in writing of such assignment, giving the name of such assignee or assignees, and from and after the receipt of such notice by the Optionor, Optionee shall be relieved from all liability on account of any act or omission on its part thereafter.

## XX.

It is further stipulated and agreed that in the event the Optionee decides that any of the claims hereinbefore described do not have sufficient mineral to justify the development work or the doing of the annual assessment work thereon that such claims may be abandoned whenever Optionor consents thereto in writing, signed by the President and Secretary of the Optionor.

## XXI.

It is understood and agreed that said Optionor shall have the right to withdraw said Cinnabar Group of lode mining claims from the terms of this option, provided the Optionee has not given prior written notice to Optionor that it desires to mine or buy said Cinnabar Group, the said written notice of its desire to withdraw said mining claims from the terms of this option to be given by Optionor by registering the same to the Optionee at 922 Crocker



## Defendant's Exhibit No. 5—(Continued)

Building, San Francisco, California, and that after the giving of said written notice, then, and in [Page 34] that event, the said Optionee shall not have the right to the possession of said Cinnabar Group and the said Optionee shall be under no obligation to pay said sum of \$600,000.00 herein mentioned as the purchase price for said Cinnabar Group. If, however, the said Optionee gives prior written notice to the said Optionor of its desire to mine or buy said Cinnabar Group, said written notice to be given by registering the notice thereof to the Optionor at 258 Sonna Building, Boise, Idaho, and also registering a copy thereof to Hawley & Worthwine, 601 Eastman Building, Boise, Idaho, then, and in that event, the said Optionor shall not have the right to withdraw from the terms of this option said Cinnabar Group until the said Optionee shall, by written notice mailed as aforesaid, have given notice that it does not desire to proceed further under the option herein contained to purchase the said Cinnabar Group of lode mining claims; provided, however, that when \$900,000.00 shall have been paid under this entire option then the Optionee must, at the completion of the payment of said \$900,000.00, elect by written notice given Optionor as aforesaid, as to whether it shall continue under this option as to said Cinnabar Group; and if it does not so elect then the option herein given on said Cinnabar Group shall cease and terminate. In the event Optionee does elect to continue this option on said Cinnabar Group the



Defendant's Exhibit No. 5—(Continued)

royalties on all ores mined from either the Meadow Creek Group or the Cinnabar Group shall apply first on the purchase price of [Page 35] said Meadow Creek Group until \$900,000.00 shall have been paid, and then on the purchase price of \$600,000.00 for said Cinnabar Group, all royalties to be as prescribed herein.

In the event Optionee gives notice that it desires to mine or buy said Cinnabar Group it agrees to expend such an amount and do such work thereon, or for its benefit, as will fulfill the requirements of annual assessment work, during any period that its election to mine or buy is in force as herein provided.

## XXII.

It is hereby stipulated and agreed that this agreement settles and adjusts all claims of every kind and character which the Optionor has against F. W. Bradley, the F. W. Bradley Estate, the Yellow Pine Company and The Bradley Mining Co., on account of any alleged non-performance by the said F. W. Bradley; the said Yellow Pine Company, and/or the said Bradley Mining Co., except Optionee shall account to Optionor for Optionor's percentage of the net profit on concentrates on the above described Meadow Creek property on August 1, 1939, as determined under a contract of October 3, 1930, between Optionor and the Yellow Pine Company.

## XXIII.

It is hereby stipulated and agreed, and the said

## Defendant's Exhibit No. 5—(Continued)

escrow holder is hereby instructed to return and deliver to the Optionor all deeds heretofore executed by the Optionor [Page 36] to F. W. Bradley, the Yellow Pine Mining Company, and/or the Bradley Mining Co., which are now filed in escrow with the above escrow holder, except that the said escrow holder shall deliver to the Optionee that certain quit claim deed, dated on or about the 31st day of March, 1937, the said quit claim deed being from the Yellow Pine Company, a corporation, to the United Mercury Mines Company, a corporation, which said deed is now on deposit in the above referred to escrow with the said escrow holder.

## XXIV.

The blocked marginal captions herein contained are for convenience only and are not to be considered in construing this instrument.

UNITED MERCURY MINES  
COMPANY, a corporation,

[Seal] /s/ By J. J. OBERBILLIG,  
Its President  
Optionor

Attest: /s/ D. D. Oberbillig, Its Asst. Secretary.

BRADLEY MINING CO.,  
a corporation,

/s/ By JOHN D. BRADLEY,  
Its Vice-President  
Optionee

Attest: E. A. Griffen, Its Secretary.

Defendant's Exhibit No. 5—(Continued)

Page 37

State of Idaho,  
County of Ada—ss.

On this 24th day of May, 1939, before me, Walter G. Bell, a Notary Public in and for said County and State, personally appeared J. J. Oberbillig and D. D. Oberbillig, known to me to be the President and Assistant Secretary, respectively, of the United Mercury Mines Company, one of the corporations that executed the above and foregoing instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and official seal the day and year last above written.

[Seal]            /s/ WALTER G. BELL,  
Notary Public for Idaho

State of California,  
City and County of San Francisco—ss.

On this 16th day of May, 1939, before me, W. W. Healey, a Notary Public in and for said County and State, personally appeared John D. Bradley and E. A. Griffen, known to me to be the Vice-President and Secretary, respectively, of the Bradley Mining Co., one of the corporations that executed the above and foregoing instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my



MAR 20 1957

Admitted

V.

The optionee hereby agrees, in the event it continues to exercise its rights under this option, to do and perform (subject always to the right of the optionee to discontinue this agreement and to be relieved from any further obligation to proceed hereunder as set in Paragraph \_\_\_\_ hereof) the following:

(a) To perform and complete upon, or in or for the benefit of said ~~two~~ <sup>Wagon Creek</sup> group of mining claims, prior to the first day of May of each and every year that said optionee remains in or is entitled to the possession of ~~the property~~ <sup>the property</sup> under the terms of this agreement, the necessary annual assessment work to hold and protect

said claims under the mining laws of the United States and the State of Idaho, and to file and record, on or before the first day of June of each and every year during the occupation of said premises by said optionee under the provisions of this agreement, in the office of the County Recorder of Valley County, State of Idaho, on behalf of optionee, the necessary proofs of such <sup>Myers Creek (sum of</sup> annual labor or assessment work upon said mining claims. <sup>X</sup>

(b) To spend in, upon, and for the benefit or on account of said properties, annually during the life of this agreement, the sum of at least twenty five

thousand Dollars (25,000.00), said sum to include, but not necessarily in addition to, such sums required for the annual assessment work provided in sub-paragraph (a) immediately preceding, it being understood that the places where and the manner in which the said sum shall be expended shall be in the sole discretion of the optionee, and that if said sum

S.

Optionee agrees to file the proofs of annual assessment work for said American Group in no later than the date of the annual assessment for the work done by applicant therefor.

Development :  
work :





is spent in development work that can be applied as

assessment work on said claims it shall not be necessary for optionee to perform other or additional assessment work.

(c) To pay to the optionee, at the times and in the manner hereinafter provided, the following royalties upon all ores, metals or values extracted from the mining grounds included in this option during the periods hereinafter named:

First: For the period from the date hereof and ending ~~December 31, 1943~~ <sup>May 1, 1939</sup>, a royalty of seven and one-half per cent ( $7\frac{1}{2}\%$ ) upon all net smelter, ~~mint~~ <sup>or</sup> ~~turns~~ <sup>or other net revenues as defined herein</sup> on all ~~metals~~ <sup>ores</sup> and values extracted from said optioned mining claims;

Second: For the period beginning ~~at midnight, January 1, 1944~~ <sup>May 1, 1949</sup>, and ending ~~December 31, 1949~~, a royalty of ten per cent (10%) upon all net smelter, mill or mint returns on all metals, ores and values extracted from said optioned mining claims;

Third: For the period beginning ~~January 1, 1949~~ <sup>May 1, 1949</sup>, and ~~thereafter~~, a royalty of twelve and one-half per cent ( $12\frac{1}{2}\%$ ) upon all net smelter, ~~mint~~ or mint returns on all metals, ores and values extracted from said optioned mining claims.

The said royalties shall be deposited by optionee in the Crocker First National Bank of San Francisco, California, to and for the credit and order of said optionor, on or before the twentieth (20th) day of the calendar month next succeeding the receipt of said net returns by optionee, and the same to be so paid each and

Manner  
of  
Payment



every month when there are any net smelter, ~~mint~~ or mint returns until the purchase price of said mining claims and properties has been completed as herein provided.

By net smelter returns, as used herein, is meant the ~~net~~ amount received <sup>from the smelter</sup> from any ores, concentrates, metals, or values shipped to a smelter, it being understood that the smelter will deduct its <sup>now</sup> smelting charges and also may deduct charges for railroad freight from Cascade, Idaho, to said smelter ~~shall also be deducted~~.

By net ~~mint~~ returns, as used herein, is meant the net amount paid by any ~~milling~~ company, with the right of said ~~milling~~ company to deduct milling charges only.

By net ~~mint~~ returns, as used herein, is meant the ~~net~~ amount paid by any United States Mint <sup>which is operating as a mint</sup> ~~located in the State of Idaho~~. It is understood and agreed that when the sum of

Nine Hundred Thousand Dollars (\$900,000.00) shall have been paid by the optionee to the optionor then, and in that event, the escrow holder herein named shall deliver to the optionee the deeds and title papers deposited with said escrow holder under the terms hereof for the above and foregoing described Meadow Creek Group.

(a) The optionee will not remove any ~~machinery~~, <sup>buildings</sup> building or other ~~equipment~~ now situate upon or used in connection with the hereinbefore described properties, and it will keep the same in good condition and repair it at its own expense, and the optionee also agrees that all improvements made and buildings placed upon said premises shall be appurtenant thereto, and in the event that the optionee does not complete the purchase of said mining properties under the terms of this agreement and in case of termination, cancellation or forfeiture hereof or hereunder, the said improvements and buildings shall

Improvements :  
Not :  
Severable :





the name of such assignee or assignees, and from and after the receipt of such notice by the optionor, optionee shall be relieved from all liability on account of any act or omission on its part thereafter.

#### XVI.

It is further stipulated and agreed that in the event the optionee decides that any of the claims hereinbefore described do not have sufficient mineral to justify the development work or the doing of the annual assessment work thereon that such claims may be abandoned whenever optionor consents thereto in writing, signed by the President and Secretary of the optionor.

#### XVII.

It is understood and agreed ~~that~~ in regard to the said Cinnabar Group of lode mining claims ~~hereinafter de-~~

~~scribed, that if at any time before the optionee herein~~

~~gives written notice to the optionor that it desires to~~  
~~withdraw said Cinnabar Group, then said optionor shall have~~

~~the right to withdraw said group of lode mining claims~~

~~from the terms of this option, the said written notice of~~

~~its desire to withdraw said mining claims from the terms~~

~~of this option to be given by optionor by registering the~~

~~same to the optionee at 922 Crocker Building, San~~

~~Francisco, California, and that after the giving of said~~

~~written notice then, in that event, the said optionee~~

~~shall not have the right to the possession of said Cinnabar~~

~~Group and the said optionee shall be under no obligation~~

~~to pay said sum of \$600,000.00 herein mentioned as the~~

~~purchase price for said Cinnabar Group. If, however, the~~

~~said optionee gives <sup>prior</sup> written notice to the said optionor~~

~~of its desire to mine <sup>or sell</sup> said Cinnabar Group, said written~~

~~notice to be given by registering the notice thereof to~~

~~the optionor at 258 Sonoma Building, Boise, Idaho, and also~~

provided the optionee has not given prior written notice to the optionor that it desires to mine or sell said Cinnabar Group.



Defendant's Exhibit No. 5-A--(Continued)

registering a copy thereof to Hawley and Worthwine, 610 Eastman Building, Boise, Idaho, then, in that event, the said optionor shall not have the right to withdraw from the terms of this option said Cinnabar Group until the said optionee shall, by written notice mailed as aforesaid, have given notice that it does not desire to proceed further under the option herein contained to purchase the said Cinnabar Group of lode mining claims: provided, however, that when \$900,000.00 shall have been paid under this entire option then the optionee must, at the completion of the payment of said \$900,000.00, elect by written notice given optionor as aforesaid as to whether it shall continue under this option as to said Cinnabar Group; and if it does not so elect then the option herein given on said Cinnabar Group shall cease and terminate. In the event optionee does elect to continue this option on said Cinnabar Group the royalties on all ores mined from either the Meadow Creek Group or the Cinnabar Group shall apply first on the purchase price of said Meadow Creek Group until \$900,000.00 shall have been paid, and then on the purchase price of \$600,000.00 for said Cinnabar Group, all royalties to be as prescribed herein.

## XXIX.

It is hereby stipulated and agreed that this agreement settles and adjusts all claims of every kind and character which the optionor has against F. W. Bradley, the F. W. Bradley Estate, the Yellow Pine Company, and the Bradley Mining Company on account of any alleged non-performance by the said F. W. Bradley, the said Yellow Pine Company, and/or the said Bradley Mining Company *except*



## DEFENDANT'S EXHIBIT No. 6

## AGREEMENT

This Agreement, Made and entered into this 20th day of July, 1950, by and between the United Mercury Mines Company, an Idaho corporation, with its principal place of business at Boise, Idaho, and Oscar W. Worthwine, of Boise, Idaho, parties of the first part, and the Bradley Mining Co., a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do business in the State of Idaho by virtue of a full and complete compliance with the Constitution and laws of the State of Idaho, party of the second part,

Witnesseth:

Whereas, the United Mercury Mines Company did, by a Conveyance and Royalty Agreement dated the 31st day of December, 1941, and recorded in the office of the County Recorder of Valley County, Idaho at 9:01 a.m., on the 30th day of January, 1942, in Book 20 of Deeds at page 510 thereof, convey to the Bradley Mining Co., the Meadow Creek Group of Mining Claims situate in the Yellow Pine Mining District in Valley County, Idaho; and

Whereas, by said Conveyance and Royalty Agreement it was agreed by and between the parties that the said Bradley Mining Co. would pay to the United Mercury Mines Company a royalty, all as set forth in said Conveyance and Royalty Agreement, and that out of the royalty due to the said United Mercury Mines Company, the said Bradley



Defendant's Exhibit No. 6—(Continued)

Mining Co. would pay direct to Oscar W. Worthwine three and one-third ( $3\frac{1}{3}\%$ ) percent of the royalty due to the said United Mercury Mines Company; and

Whereas, various other properties have been conveyed to the Bradley Mining Co. by the United Mercury Mines Company under the terms and conditions set forth in the above described Conveyance and Royalty Agreement; and

Whereas, under the terms and conditions of said Conveyance and Royalty Agreement the said Bradley Mining Co. is obligated to pay a monthly royalty as above set out, said monthly royalty to be paid on or before the 20th day of the month next succeeding the receipt by said Bradley Mining Co. of moneys received during the previous month; and

Whereas, the said Bradley Mining Co., did, on the 20th day of June, 1950, pay to the United Mercury Mines Company and said Oscar W. Worthwine the royalties due for the month of May, 1950; and

Whereas, the parties hereto desire to postpone for one (1) year the payment of royalties accruing to said United Mercury Mines Company and Oscar W. Worthwine for the months of June to November, 1950, both inclusive;

Now, Therefore, for and in consideration of the premises and the mutual covenants herein contained, it is hereby agreed:

(1) That the royalty becoming due and payable under the above described Conveyance and Royalty

## Defendant's Exhibit No. 6—(Continued)

Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of June, 1950, which would become due July 20, 1950, shall be postponed until July 20, 1951, at which time the said Bradley Mining Co. shall pay the same;

That the royalty becoming due and payable under the above described Conveyance and Royalty Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of July, 1950, which would become due August 20, 1950, shall be postponed until August 20, 1951, at which time the said Bradley Mining Co. shall pay the same;

That the royalty becoming due and payable under the above described Conveyance and Royalty Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of August, 1950, which would become due September 20, 1950, shall be postponed until September 20, 1951, at which time the said Bradley Mining Co. shall pay the same;

That the royalty becoming due and payable under the above described Conveyance and Royalty Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of September, 1950, which would become due October 20, 1950, shall be postponed until October 20, 1951, at which time the said Bradley Mining Co. shall pay the same;

That the royalty becoming due and payable under

## Defendant's Exhibit No. 6—(Continued)

the above described Conveyance and Royalty Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of October, 1950, which would become due November 20, 1950, shall be postponed until November 20, 1951, at which time the said Bradley Mining Co. shall pay the same;

That the royalty becoming due and payable under the above described Conveyance and Royalty Agreement by the Bradley Mining Co. to the United Mercury Mines Company and Oscar W. Worthwine for the month of November, 1950, which would become due December 20, 1950, shall be postponed until December 20, 1951, at which time the said Bradley Mining Co. shall pay the same.

(2) It is further agreed that the said Bradley Mining Co. shall make the usual monthly reports as to moneys received by it during the preceding month upon which royalties would be payable, stating the amounts of royalties that had accrued, but, instead of sending the check as has been the practice during the past ten years, shall make a notation thereon to the effect that "the above accrued royalty has been postponed for a period of one (1) year from the.....day of....., 1950, to the..... day of....., 1951, at which time the same shall become payable".

(3) Save and except for the above and foregoing postponement of royalties, the said Conveyance and Royalty Agreement, in all of its particulars and provisions, shall remain in full force and effect.

Defendant's Exhibit No. 6—(Continued)

In Witness Whereof United Mercury Mines Company, an Idaho corporation has hereunto caused its corporate name to be subscribed, and its corporate seal to be hereunto affixed, duly attested by its Secretary, pursuant to resolution duly adopted by its Board of Directors; Oscar W. Worthwine, one of the parties of the first part, has hereunto set his hand and seal; and Bradley Mining Co., a corporation, the party of the second part, has hereunto caused its corporate name to be subscribed by its Vice-President, and its corporate seal to be hereunto affixed, duly attested by its Secretary, pursuant to resolution duly adopted by its Board of Directors, on this 20th day of July, 1950.

UNITED MERCURY MINES  
COMPANY,

By J. J. OBERBILLIG,

[Seal] OSCAR W. WORTHWINE,  
Parties of the First Part;

Attest: Veda Steil, Its Ass't Secretary.

[Seal] BRADLEY MINING CO.,  
a corporation,

By JOHN D. BRADLEY,  
Its Vice-President,  
Party of the Second Part.

Attest: E. A. Griffen, Its Secretary. [Seal]

PLAINTIFF'S EXHIBIT No. 11

[Letterhead of Bradley Mining Co.]

Air Mail

April 14, 1948

Mr. John J. Oberbillig, President,  
United Mercury Mines Co.,  
256 Sonna Building,  
Boise, Idaho.

Dear John:

Your letter of April 12 in reply to mine of March 31 arrived yesterday, and as I did not understand your reply to the proposal contained in my letter, I telephoned Oscar Worthwine yesterday afternoon thinking that perhaps he had had a chance to explore the situation with you and learn your reactions.

Oscar advised me that he believes you have in mind that should the smelter be constructed on our property, there should be no deduction for normal smelter charges and that accordingly the 5% royalty should apply on net smelter proceeds. Oscar was not clear on your proposal for aiding us in financing the smelter. If the foregoing interpretation of your thinking is correct, then the following is my reaction:

First, although we appreciate your intentions, we are not asking you to aid us in financing the smelter. Secondly, if you have in mind that if the smelter were located on Yellow Pine Mine property that in such instance normal smelter charges should not be deducted prior to calculating the 5% royalty,



## Plaintiff's Exhibit No. 11—(Continued)

then in that case I feel you do not completely understand the situation.

The present 5% royalty rate on net smelter returns was based on the Yellow Pine Mine property with the metallurgical improvements limited to concentrating facilities. Naturally, even after the smelter is built if raw concentrates such as tungsten are shipped, then the 5% royalty rate would apply. The further metallurgical step of reducing the concentrates requires an entirely different basis for royalty computation. I have endeavored to explain this in some detail in my letter of March 31 and I would appreciate your rereading and studying the points outlined.

Oscar Worthwine stated that he did not understand what normal smelter charges were, and asked if I would explain this further. In this connection I am enclosing herewith a memo from the Bunker Hill Smelter outlining how they determine normal smelting charges. Heretofore in discussing the situation with you and writing you about it, I have indicated that normal smelter charges include not only treatment charges but also metal or metallurgical deductions and quotational deductions. In applying this common smelter practice to the case of our shipments, I have suggested that the precedent of several years of our shipments be used as a guide in determining what would be a normal smelter charge, which we then feel would be fair to apply at our new Stibnite smelter. To give an estimated breakdown on costs involved in current shipments

## Plaintiff's Exhibit No. 11—(Continued)

I present the following, which, of course, can only be an estimate as we do not know our consumers' costs. Example—The Harshaw Chemical Company:

Assumption 50% Sb concentrates — market price  
33c/# f.o.b. Western points

Estimated Harshaw Chemical net sales price converted back to tons of concentrate: \$350/ton (incl. Au & Ag).

Cost of concentrates to H. C. Co., 210\* (incl. Au. & Ag).

Harshaw profit and treatment costs: 140.

Estimated Harshaw treatment costs: 75.

Estimated Harshaw profit: \$65/ton.

\*Harshaw pay to B. M. Co. at El Segundo: \$210.

Less truck and R.R. frt. to El Segundo: 20.

B. M. Co. net at Stibnite: \$190.

In view of the above, we believe the correct Stibnite smelter treatment charge per ton of raw concentrates should be, under similar conditions of price and grade, \$165/ton (Harshaw sales value \$350, minus B. M. Co. receives at Cascade \$185 = \$165).

Rather than endeavoring to determine the correct smelting charge to be applied against each ton of raw concentrates, we prefer the simplified procedure of applying a royalty rate which will reflect the normal smelter charges and which will at the same time actually increase the returns to the United Mercury Mines Co.

## Plaintiff's Exhibit No. 11—(Continued)

In arriving at the suggested 2.75% rate to replace the 5% royalty rate in the instance of locally smelted concentrates, we have applied the following procedure:

$0.05 \times \$190 = \$9.50$  royalty/ton of concentrate to U. M. M. Co.

$0.0275 \times 350 = 9.65$  royalty/ton of concentrate to U. M. M. Co.

In contrast to arriving at the simplified procedure of applying a flat 2.75% royalty rate for locally reduced concentrates, we could, of course, use as a base our actual operating costs at Stibnite plus other charges that would be made by any competing smelter. A third method of arriving at the normal smelting charges would be periodically to offer our different concentrates to various smelters accepting those types of concentrates in order to arrive at the pay for the metals contained in those concentrates. We could then use such bids offered for our different types of concentrates as a basis for arriving at our smelting costs at Stibnite. Of course, the great disadvantages to these latter alternatives would be that they might leave room for petty disputes.

Although today we are approving preliminary arrangements for the construction of a smelter to reduce our Yellow Pine Mine concentrates, we have not yet decided on the exact location of the reduction plant. We intend to proceed, however, with the roasting facilities at Stibnite and the placing of orders for the electric furnace and the refining and converting equipment. At a later date we will make

## Plaintiff's Exhibit No. 11—(Continued)

the final decision as to the location of this reduction plant.

In view of the high cost of building 40 homes at Stibnite (\$250,000 including water, electric and sewerage facilities), we are seriously considering Cascade as the location of our reduction plant. The reduction plant, of course, would take by far the greater majority of the smelter crew; i.e., there would be very few men allocated to the roasting department, so that housing at Stibnite for the roasting plant alone would not be a problem. This may appear like an uneconomical move in view of the transportation of calcines by truck to Cascade. However, there are several compensating factors—one, I have already mentioned a possible substantial saving in housing; two, for an eventual custom smelter business a location on a railhead for the reduction plant would have certain advantages for the Northwest as a whole—although I can see certain disadvantages for other properties in the Yellow Pine Mining District; three, the incoming tonnage for reagents, etc. would greatly aid in offsetting the outgoing tonnage of calcines which would be substantially reduced in weight over the raw concentrates. We are presently exploring the housing situation in Cascade.

Whether or not the complete smelter is constructed at Cascade or Stibnite, the smelter will have to be an entirely separate division from the Yellow Pine Mine and its concentrating plant from an operating, accounting, and taxation standpoint.



Plaintiff's Exhibit No. 11—(Continued)

In other words, it is a separate venture and should not be tied in with the royalty schedule of Yellow Pine Mine as it now stands.

We should make a final decision on the location of the reduction plant by June 1. The attitude you are going to take on this entire subject will naturally affect a decision as to location. Accordingly, I would appreciate your reactions at the earliest date possible; particularly since I will not return to Idaho for at least ten days.

Very truly yours,

/s/ John D. Bradley,

Executive Vice President.

JDB:MM      Enc.      cc: OWW

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DEFENDANT'S EXHIBIT No. 21

[Rejected]

[Letterhead of Oscar W. Worthwine]

December 30, 1941

Bradley Mining Company,  
425 Crocker Building,  
San Francisco, California.

Attention: John D. Bradley.

Dear Sirs:

John and I have gone over Mr. Davis' letter and have made the corrections suggested by him and I am herewith enclosing an original and two copies of the corrected pages that I have rewritten, the corrections being as follows:



## Defendant's Exhibit No. 21—(Continued)

Page 16—About the middle of the page in caps appears the word "SOLD", this should be changed to "HOLD". I have not rewritten this page because the correction can easily be made on the three copies which you have in your possession.

Page 12—I have rewritten page 12 by inserting in the next to the last line after the word 'operations' and the word 'upon' the following "and development work."

This is to comply with the suggestion made by Mr. Davis under subdivision (4) on page 3 of his letter of December 26th.

Page 17—Failure to do assessment work. I have rewritten this page by adding at the end of paragraph I the following:

"failure by Bradley to do said assessment work shall not work a forfeiture of the grant and conveyance hereinbefore made."

This is to comply with the suggestion made by Mr. Davis under subdivision (b) on page one in regard to the doing of assessment work.

Page 22—I have rewritten page 22 but adding at the end of paragraph VII the following:

"and failure to give a written notice of its election not to proceed under this option shall not be considered as an election to proceed under this option."

This is to overcome the objection made by Mr. Davis to subdivision (c) on page 2 of his letter.

I suggest you take the three copies of option I sent you and take out the pages that are now in

## Defendant's Exhibit No. 21—(Continued)

and insert the enclosed pages, and your stenographer can make the correction on page 16 where the word 'sold' is to be changed to 'hold.'

I believe these corrections meet all the suggestions made by Mr. Davis except the matter of title concerning which I wrote you on yesterday.

Taxes: While the memorandum brief which I sent you suggests that I have read a few decisions by the Supreme Court of the United States in regard to depletion I did not pretend and do not now claim to have made any exhaustive study of this matter.

On page 4 of his letter Mr. Davis refers to an opinion by J. P. Wenchel of the Bureau of Internal Revenue. I have read that opinion and still I am not certain but that the Internal Revenue Department and the Courts will hold that the particular arrangement here is a sale and that the United will not be entitled to depletion. Mr. Wenchel in his opinion states that the rule adopted by the Supreme Court of the United States is that if a gross royalty is to be paid the Lessor is entitled to take depletion, while if a net royalty is to be paid the Lessor is not entitled to take depletion.

Under the arrangement that the United is now making with Bradley we are not receiving a gross royalty. This is because we are agreeing to allow Bradley \$2.50 per ton for each ton of concentrates shipped. However, on this particular point it is probable that the Supreme Court will hold that it is more nearly a gross royalty than a net royalty.

## Defendant's Exhibit No. 21—(Continued)

This because of the almost uniform and universal practice of allowing the deduction of freight, assay, and smelting charges from what we ordinarily consider to be a net royalty. However, in view of the opinion given you by your tax consultants I assume you are satisfied with this tax matter.

If the entire contract is now satisfactory I suggest that your Board of Directors approve it and that we be furnished with certified copy of Resolution approving it, and that it be signed by your officers with the attesting seal of the corporation impressed thereon. Then the United can sign the copies which you bring with you and then we can have the stockholders and directors approve and ratify the acts of the President and Secretary in entering into this contract.

John advises me he does not anticipate the slightest difficulty in having the stockholders and directors approve this transaction.

Yours very truly,

/s/ Oscar W. Worthwine.

OWW:W      encls

DEFENDANT'S EXHIBIT No. 22

[Rejected]

[Letterhead of Oscar W. Worthwine.]

December 30, 1941

Bradley Mining Company,  
425 Crocker Building,  
San Francisco, California.

Attention: John D. Bradley.

Dear John:

Re: Conveyance, Royalty Agreement and Option

On yesterday I sent you certain pages which I had rewritten with the suggestion that you insert the same in the agreement in lieu of the ones originally placed therein.

In the sheets I sent you yesterday I only made one change on page 12 which was the addition of the words "and development work" in the second line from the bottom.

I am enclosing three copies of page 12 which I have again rewritten, and I am also enclosing one copy of page 12 to which is attached a note to the effect that it is not to be inserted in the agreement. The reason I am enclosing this sheet is because I have underscored for your reference the changes which I believe should be made in respect to the \$2.50 per ton allowance for trucking.

In drawing the instrument about two weeks ago I made no change whatsoever in the provisions of the 1939 contract in regard to the \$2.50 allowance per ton for trucking, but if you will examine page

Defendant's Exhibit No. 22—(Continued)

12 carefully or the provisions of the 1939 contract in regard to the \$2.50 per ton allowance you will note it contemplates only the shipment of concentrates or products to a smelter. In other words, there may be room for the contention that when you ship concentrates to the General Electric that you are not shipping to a smelter, and therefore you would not be entitled to the \$2.50 allowance. Then in time you may produce something other than concentrates which would be shipped to other than a smelter. If you found a cinnabar deposit you would not ordinarily ship your product to a smelter, and I believe we should include the words: "to market" and "market returns".

So much for straightening out the paragraph so that it will prevent any claim being presented against your company.

On the other hand, looking at it from the standpoint of the United, it might be that in the future a mill or smelter will be erected at Yellow Pine and certainly it was not the intention of the parties that you would be allowed \$2.50 per ton haul for ore from Stibnite to Yellow Pine. Consequently, as I have redrafted this paragraph and as shown by the enclosed copy which contains the underscoring I have limited the allowance of \$2.50 per ton to concentrates or products to the Couer d'Alenes or to a market or smelter outside the state of Idaho.

I believe it was the intention of the parties when the 1939 contract was drawn that you should be permitted \$2.50 per ton for all shipments made



## Defendant's Exhibit No. 22—(Continued)

from Cascade by rail or all truck shipments made from Stibnite to Kellogg as well as any shipment by truck from Stibnite to Salt Lake or other points. I likewise believe it was the intention of the parties that you should have the \$2.50 per ton allowance whether you shipped to a smelter or sold your products to a consumer.

Therefore, if a new contract is entered into this paragraph should be so worded that no board of directors of the United could ever contend you were not entitled to the \$2.50 allowance for shipments made to Kellogg or points outside the state of Idaho even though such shipments did not go to a smelter.

I am not worried about you or your family contending that you could put a mill or smelter at Yellow Pine or some other point off this particular property and be entitled to \$2.50 per ton for transporting the ores from the property to the mill or smelter, but if control of this property should pass from you and your family I do not desire it to be possible for your successors to contend that by building a mill at Yellow Pine or some other place nearby that they would be entitled to a haulage charge of \$2.50 per ton for ores.

As I wrote you yesterday in my opinion the question of whether this is a sale so that the respective parties will not be entitled to depletion, or whether it is a transaction under which each party will be entitled to depletion depends on whether the United is entitled to a royalty on the gross or a royalty on the net, and in my opinion the changes I have sug-

Defendant's Exhibit No. 22—(Continued)  
gested above bear on this point because it is conceivable that if you were allowed \$2.50 per ton from a point as near by as Yellow Pine there would never be any net for United.

Therefore I suggest that it is to the advantage of both parties that the enclosed unmarked copies of page 12 be inserted in the agreement in lieu of the one mailed you yesterday.

Wishing you a happy and successful New Year,  
I am

Yours very truly,

/s/ Oscar W. Worthwine.

OWW:W      encl

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PLAINTIFF'S EXHIBIT No. 26

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS

Plaintiff, United Mercury Mines Company, requests Defendant, Bradley Mining Co., within fifteen (15) days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this request, copies of which are attached, is genuine.

(a) Copy of letter dated January 29, 1942 to Mr. George K. Dorsey, Reynolds & Co., 1500 Walnut

Plaintiff's Exhibit No. 26—(Continued)  
Street, Philadelphia, Pa., from John D. Bradley,  
signed with initials "J.D.B."

(b) Letter dated March 17, 1947, addressed to  
Mr. John J. Oberbillig, President, United Mercury  
Mines Company, 256 Sonna Building, Boise, Idaho,  
relative to Antimony Ridge Group, including  
Golden Gate Claims, from Bradley Mining Co.,  
signed by John D. Bradley as Vice President.

/s/ PAUL S. BOYD,  
/s/ E. H. CASTERLIN,  
/s/ DALE CLEMONS,  
Attorneys for Plaintiff.

Acknowledgment of Service attached.

(Copy)

For: J. J. Oberbillig, 258 Sonna Bldg., Boise,  
Idaho.

Mr. George K. Dorsey, January 29, 1942  
Reynolds & Co.,  
1500 Walnut Street, Philadelphia, Pa.

Dear Sir:

Your letter of the 17th inst. addressed to my  
father, the late F. W. Bradley, has been received.

The Yellow Pine Company has been superseded  
by the Bradley Mining Co. as the operator of the  
Yellow Pine Mine previously owned by the United  
Mercury Mines Co.

On January 1st, 1942, a new agreement between  
United Mercury Mines Co. and Bradley Mining Co.  
was concluded whereby title to the property passed

Plaintiff's Exhibit No. 26—(Continued)  
to the Bradley Mining Co. and the latter company  
thereby agrees to pay the United Mercury Mines  
Co. a perpetual 5% royalty on the net sales pro-  
ceeds.

On the 1941 production the royalties payable to  
United Mercury Mines Co. amount to \$66,000.

For further information please contact Mr. J. J.  
Oberbillig, 258 Sonna Building, Boise, Idaho.

Yours very truly,  
/s/ J.D.B.

JDB:CFd—cc. J. J. Oberbillig.

Bradley Mining Co.  
P.O. Box 737, Boise, Idaho      March 17, 1947  
Mr. John J. Oberbillig, President      (Copy)  
United Mercury Mines Company  
256 Sonna Building, Boise, Idaho

Re: Antimony Ridge Group, including Golden  
Gate Claims

Dear John:

Confirming our several telephone conversations of  
this morning, this is to advise you of our wish that  
you proceed with Mr. Worthwine in the prepara-  
tion of a conveyance and royalty agreement for the  
Antimony Ridge Group and the Golden Gate claims  
similar to our recent conveyance for the Midnight  
Group, for the consideration of \$7,500.00 to be paid  
at the time of consummating the agreement.

As you know under the arrangement for the Mid-  
night Group, it was taken over by the Bradley

## Plaintiff's Exhibit No. 26—(Continued)

Mining Co. under the same terms and conditions under which we took over the Meadow Creek and Hennessey Groups at Stibnite. Under this arrangement we are to pay a 5% perpetual gross royalty.

It occurs to me that the advantage to you and your stockholders is that the United Mercury Mines Company will receive a 5% gross royalty from any ores mined, shipped and sold from any property, whether from the Meadow Creek, Hennessey, Mid-night or Antimony Ridge groups. This will simplify the keeping of records as it will not be necessary for us to keep a separate record of ores taken from any one group. We also believe that if there is common ownership of the entire group we will have somewhat more freedom in applying work and labor done in one place on the claims in all the groups.

Bradley Mining Co. will also either give you a letter or a separate agreement to the effect that if it desires to abandon any of the claims in the Antimony Ridge Group that it will, on or before April 1 in any year, give you a quitclaim deed to the same so that you will have sufficient time to begin the assessment work on such surrendered claims during the assessment year.

With kind regards, I am

Sincerely yours,

Bradley Mining Co.

/s/ John D. Bradley,

Executive Vice President

JDB:mk

[Endorsed]: Filed October 15, 1954.



PLAINTIFF'S EXHIBIT No. 26-A

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

State of California,

City and County of San Francisco—ss.

John D. Bradley, being first duly sworn on oath deposes and says: That he is Executive Vice-President of Bradley Mining Co., a corporation, the defendant above named, and makes the following admissions and denials in response to the Request for Admissions served on the defendant by the plaintiff on October 15, 1954.

Request No. 1(a): Defendant admits that the letter referred to in Request No. 1(a) is genuine, but alleges that said letter and the contents thereof are irrelevant, improper and immaterial to the issues in this case, for the reason that the matters and things contained in said letter have no proper relation to and are not material to the question of defendant's alleged liability for the payment of additional royalties under the Conveyance and Royalty Agreement of December 31, 1941.

Request No. 1(b): Defendant admits that the letter referred to in Request No. 1(b) is genuine, but alleges that said letter and the contents thereof are irrelevant, improper and immaterial to the issues in this case, for the reason that the matters and things contained in said letter have no proper relation to and are not material to the question of defendant's alleged liability for the payment of

Plaintiff's Exhibit No. 26-A—(Continued)  
additional royalties under the Conveyance and  
Royalty Agreement of December 31, 1941.

Dated this 29th day of October, 1954.

/s/ JOHN D. BRADLEY,  
Executive Vice-President  
Bradley Mining Co.

Subscribed and sworn to before me this 29th day  
of October, 1954.

[Seal] /s/ AGNES WESTRA,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed November 2, 1954.

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PLAINTIFF'S EXHIBIT No. 27

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF

To Bradley Mining Company, Defendant,—

The plaintiff requests that the following inter-  
rogatories be answered under oath by any of your  
officers competent to testify in your behalf who  
knows the facts about which inquiry is made and  
that the answers be served on plaintiff within 15  
days from the time the same were served on you.

Interrogatory No. 1. What is the (a) amount,

Plaintiff's Exhibit No. 27—(Continued)

(b) character and (c) mineral content of all minerals, ores, metals or values mined, extracted or taken from the mining claims described in "Exhibit I" attached to plaintiff's complaint, immediately before the same were smelted, processed or treated at the Yellow Pine Smelter, so-called, during the period from July 1949 to date?

Interrogatory No. 2. What is the (a) amount, (b) character and (c) mineral content of the smelted product from said minerals, ores, metals or values mentioned in Interrogatory No. 1?

Interrogatory No. 3. Have any of the smelted products mentioned in Interrogatory No. 2 been sold by you to third parties?

Interrogatory No. 4. If your answer to Interrogatory No. 3 is in the affirmative, then give the name or names of the purchasers of the same.

Interrogatory No. 5. If your answer to Interrogatory No. 3 is in the affirmative, then give the (a) name of the saleable product so sold, (b) the amount of the same so sold, and (c) the amount of money received from the sale thereof before any deductions for marketing and shipping costs from Cascade, Idaho.

Interrogatory No. 6. If your answer to Interrogatory No. 3 is in the affirmative, then state the marketing and shipping costs connected with each sale or sales named in answer to Interrogatory No. 5.

Plaintiff's Exhibit No. 27—(Continued)

Dated November 2d, 1953.

/s/ PAUL S. BOYD,

/s/ E. H. CASTERLIN,

/s/ DALE CLEMONS,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed November 2, 1953.

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PLAINTIFF'S EXHIBIT No. 27-A

[Title of District Court and Cause.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S  
INTERROGATORIES

State of Idaho,  
County of Ada—ss.

John D. Bradley, Being first duly sworn on oath  
deposes and says:

That he is Executive Vice-President of Bradley Mining Co., a corporation, the defendant above named, and hereby answers, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the Interrogatories served upon the defendant by the plaintiff (except those interrogatories to which objections have been filed) as follows:

Interrogatory No. 1. What is the (a) amount, (b) character and (c) mineral content of all minerals, ores, metals or values mined, extracted or taken from the mining claims described in "Ex-

Plaintiff's Exhibit No. 27-A—(Continued)  
hibit I" attached to plaintiff's complaint, immediately before the same were smelted, processed or treated at the Yellow Pine Smelter, so-called, during the period from July 1949 to date?

(a) The amount of all minerals, ores, metals or values mined, extracted or taken from the mining claims described in "Exhibit I" attached to plaintiff's complaint, immediately before the same were smelted, processed or treated at the Yellow Pine Smelter of the defendant during the period July 1949 to November 2, 1953, was 28,449.835 tons of concentrates.

(b) The character of all such minerals, ores, metals or values immediately before the same were smelted, processed or treated at the Yellow Pine Smelter during the period from July 1949 to November 2, 1953, consisted of antimony concentrates and gold concentrates.

(c) The mineral content of such concentrates, as evidenced by royalty statements heretofore furnished the plaintiff, is set forth on schedule marked "Exhibit A" hereto attached and hereby made a part hereof, which schedule shows the percentage of each metal contained in each lot of concentrates therein listed and the total amount thereof in pounds or ounces.

Interrogatory No. 2 Objection filed.

Interrogatory No. 3 Objection filed.

Interrogatory No. 4 Objection filed.



Plaintiff's Exhibit No. 27-A—(Continued)

Interrogatory No. 5 Objection filed.

Interrogatory No. 6 Objection filed.

/s/ JOHN D. BRADLEY,

Executive Vice-President of  
Bradley Mining Co.

Subscribed and sworn to me before this 10th day  
of November, 1953.

[Seal] /s/ RALPH R. BRESHEARS,  
Notary Public for the State of Idaho residing at  
Boise, Idaho.

## EXHIBIT "A"

### SCHEDULE

	Character		
	Gold	Antimony	Total
	Concentrate	Concentrate	Concentrate
Dry Tons .....	8,398.465	20,051.370	28,449.835
Calculated Average Assays:			
Gold—ounces per ton	2.232	0.721	
Silver—ounces per ton	4.766	12.891	
Antimony—%	5.828	37.398	
Contents:			
Gold—ounces	18,750.305	14,458.119	33,208.424
Silver—ounces	40,026.37	258,477.08	298,503.45
Antimony—pounds	979,025.	14,997,505.	15,976,530.

Acknowledgment of Service attached.

[Endorsed]: Filed November 10, 1953.

PLAINTIFF'S EXHIBIT No. 27-B

[Title of District Court and Cause.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S  
INTERROGATORIES

State of Idaho,  
County of Shoshone—ss.

John D. Bradley, being first duly sworn, on oath deposes and says:

That he is Executive Vice President of Bradley Mining Co., a corporation, the defendant above named, and hereby answers in accordance with Rule 33 of the Federal Rules of Civil Procedure—and pursuant to the memorandum decision of acting District Judge Healy filed in the above entitled court on April 9, 1954, the Interrogatories served upon the defendant by the plaintiff, as follows:

Interrogatory No. 1. What is the (a) amount, (b) character, and (c) mineral content of all minerals, ores, metals or values mined, extracted or taken from the mining claims described in "Exhibit I" attached to plaintiff's complaint, immediately before the same were smelted, processed or treated at the Yellow Pine Smelter, so-called, during the period from July 1949 to date?

## Plaintiff's Exhibit No. 27-B—(Continued)

Answer:

(a)	(b)	(c)		
		Metal Content		Antimony
Amount— Dry Tons	Character	Gold-Oz.	Silver-Oz.	Lbs.
8,398.465	Gold Concentrate	18,750.305	40,026.37	979,025
20,051.370	Antimony Con- centrate	14,458.119	258,477.08	14,997,505
<hr/>		<hr/>		<hr/>
28,449.835	Total	33,208.424	298,503.45	15,976,530

All as shown in Exhibit A attached (previously supplied).

Interrogatory No. 2. What is the (a) amount, (b) character, and (c) mineral content of the smelted product from said minerals, ores, metals or values mentioned in Interrogatory No. 1?

Answer:

The amount, character and mineral content of the smelted product for which information is requested is set forth below and in "Exhibit B" attached hereto.

(a)	(b)	(c)		
		Metal Content		Antimony
Amount— Lbs.	Character	Gold-Oz.	Silver-Oz.	Lbs.
12,727,033	Oxide			10,563,438
211,412	Metal			210,306
179	High Purity Metal			179
360,524	Residue	26,915.682	249,062.44	225,992
97,989	Calcine	160.947	286.13	1,666
<hr/>		<hr/>		<hr/>
Total Finished Products		27,076.629	249,348.57	11,001,581
Remaining in process				
Secondary unfinished prod- ucts and absorption		1,693.671	15,360.07	1,144,402
<hr/>		<hr/>		<hr/>
Total Finished and Unfinished Products		28,770.300	264,708.64	12,145,983

## Plaintiff's Exhibit No. 27-B—(Continued)

Interrogatory No. 3. Have any of the smelted products mentioned in Interrogatory No. 2 been sold by you to third parties?

Answer: Yes.

Interrogatory No. 4. If your answer to Interrogatory No. 3 is in the affirmative, then give the name or names of the purchasers of the same.

Answer: The names of the purchasers of the smelted products referred to in Interrogatory No. 3 are shown in the information set forth in the schedules attached to "Exhibit C" filed herewith.

Interrogatory No. 5. If your answer to Interrogatory No. 3 is in the affirmative, then give the (a) name of the saleable products so sold, (b) the amount of the same so sold, and (c) the amount of money received from the sale thereof before any deductions for marketing and shipping costs from Cascade, Idaho.

Answer: The information requested in this interrogatory is set forth below, with further detail in "Exhibit C" herewith, and the schedules attached thereto.

(a)	(b)	(c)
Name	Amount - Lbs.	Amount Money Received before any deductions
Oxide	10,463,433	\$3,598,610.60
Metal	160,812	59,779.76
H. P. Metal	179	388.25
Residue	360,524	1,140,775.48
Calcine	97,989	4,248.66
	Total	<hr/> \$4,803,802.75

Plaintiff's Exhibit No. 27-B—(Continued)

Interrogatory No. 6. If your answer to Interrogatory No. 3 is in the affirmative, then state the marketing and shipping costs connected with each sale or sales named in answer to Interrogatory No. 5.

Answer: The information requested concerning the marketing and shipping costs connected with sales referred to in Interrogatory No. 5 is set forth below and in "Exhibit C" herewith and the schedules attached thereto.

Freight paid	\$84,256.11	
Miscellaneous Allowances	31.91	\$84,288.02

/s/ JOHN D. BRADLEY,  
Executive Vice President of  
Bradley Mining Co.

Subscribed and sworn to before me this 12th day of May, 1954.

[Seal] /s/ HARRIET I. BERGMAN,  
Notary Public, in and for the County of Shoshone,  
State of Idaho.

Acknowledgment of Service attached.

[Printer's Note: Exhibit "A" attached hereto is a duplicate of Exhibit "A" set out in full at page 403 of this printed record.]

[Endorsed]: Filed May 17, 1954.



PLAINTIFF'S EXHIBIT No. 28

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Plaintiff United Mercury Mines Company, a corporation, requests the defendant Bradley Mining Company, a corporation, within fifteen days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1.

That the following document, a copy of which is marked "Exhibit 1" and attached to plaintiff's complaint filed herein, is genuine,—

Conveyance, Royalty Agreement and Option dated December 31st, 1941, between this plaintiff, called "United" and this defendant, called "Bradley"

2.

That each of the following statements is true:—

(a) That the plaintiff is a citizen of the State of Idaho; that the defendant is a citizen of the State of California; that the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

(b) That on or about December 31st, 1941, United Mercury Mines Company and Bradley Mining Company entered into an agreement in writing dated that day, a true copy of which is marked "Ex-

Plaintiff's Exhibit No. 28—(Continued)

hibit 1" and is attached to plaintiff's complaint filed herein.

(c) That pursuant to the terms of said agreement, United Mercury Mines Company has conveyed to the Bradley Mining Company all of the mining claims and other property described in said agreement.

(d) That during the year 1949 Bradley Mining Company completed the construction of a smelter, commonly known as the Yellow Pine Smelter, on the mining ground described in the said agreement, at its own costs and expense.

(e) That Bradley Mining Company is now and at all times mentioned in the complaint filed herein has been the sole owner of said Yellow Pine Smelter.

(f) That Bradley Mining Company first put the said Yellow Pine Smelter into operation during the month of July, 1949.

(g) That from and after December 31st, 1941, Bradley Mining Company has mined, extracted and taken from the mining claims described in the said agreement minerals, ores, metals and values of various kinds among which are gold, silver, antimony, tungsten, sulphur, arsenic and copper.

(h) That from December 31, 1941 to July 1949, Bradley Mining Company transported or caused to be transported, pursuant to the terms of said agreement, all of the said minerals, ores, metals

## Plaintiff's Exhibit No. 28—(Continued)

and values that were treated, smelted or processed under the terms of said agreement to smelters or reduction plants located at a distance from the said mining claims, in which neither United Mercury Mines Company nor Bradley Mining Company had any interest of any kind whatever and which were foreign to the said agreement.

(i) That from and after July 1st, 1949, Bradley Mining Company transported or caused to be transported, pursuant to the terms of said agreement, only a small portion of said minerals, ores, metals and values that were extracted from said mining claims and that were treated, smelted or processed under the terms of said agreement to smelters or reduction plants located at a distance from the said mining claims and which were absolutely foreign in all respects to said agreement and the respective parties to this action.

(j) That upon receipt of the net smelter returns as defined in said agreement from the said foreign smelters or reduction plants, being those located at a distance from the said mining claims in which neither party to this action had any interest, Bradley Mining Company rendered to United Mercury Mines Company appropriate statements, in each instance after the form rendered to the plaintiff for the month of December, 1948, a true copy of which is marked "Exhibit 2" and attached to the complaint filed herein.

(k) That Bradley Mining Company, upon receipt

## Plaintiff's Exhibit No. 28—(Continued)

of the said net smelter returns from the said foreign smelters or reduction plants as defined herein, paid United Mercury Mines Company a royalty of five per cent of said receipts as provided in said agreement, at the time and in the manner prescribed in said agreement.

(l) That from and after the receipt of the net smelter returns as defined in the said agreement, from the said smelters or reduction plants located distant from the said mining claims and in which neither party to this action had any interest whatever, Bradley Mining Company had no right, title, interest, claim and/or demand in and to said minerals, ores, metals and values mined, extracted or taken from the said mining claims, or any part thereof, and the same were the property of the said smelters.

(m) That from and after July 1st, 1949, Bradley Mining Company processed through the Yellow Pine Smelter the greater part of the minerals, ores, metals and values extracted from the said mining claims, being all that were not processed by a foreign smelter.

(n) That after Bradley Mining Company has so processed the said minerals, ores, metals and values extracted from the said mining claims in the Yellow Pine Smelter, the saleable products resulting therefrom are held and retained by the Bradley Mining Company as its sole property until the same are sold to a purchaser.

Plaintiff's Exhibit No. 28—(Continued)

(o) That Bradley Mining Company has sold to purchasers saleable products resulting from the smelting and reduction of minerals, ores, metals and values taken from the said mining claims in the Yellow Pine Smelter.

(p) That the Bradley Mining Company has sold to purchasers saleable products resulting from the smelting and reduction of minerals, ores, metals and values extracted, mined and taken from the mining claims described in said agreement, in the Yellow Pine Smelter.

(q) That the Bradley Mining Company has not paid to United Mercury Mines Company as royalty a sum or sums of money equal to five per cent of the amount or amounts paid by any purchaser or purchasers from the sale of saleable products obtained from the concentrates, ores, metals or values shipped, taken or produced from the mining claims described in said agreement, less marketing and shipping costs as defined in said agreement.

Dated September 14, 1953.

PAUL S. BOYD, E. H. CASTERLIN  
and DALE CLEMONS,  
Attorneys for Plaintiff herein.

/s/ By PAUL S. BOYD.

Acknowledgment of Service attached.

[Endorsed]: Filed September 17, 1953.



PLAINTIFF'S EXHIBIT No. 28-A

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

State of California,  
City and County of San Francisco—ss.

John D. Bradley, being first duly sworn, on oath deposes and says:

That he is Executive Vice President of Bradley Mining Co., a corporation, the defendant above named, and makes the following admissions and denials on the Request for Admissions served on the defendant on the 17th day of September, 1953, by the plaintiff.

Request No. 1. Defendant admits the matters stated therein.

Request No. 2 (a). Defendant admits the matters stated therein.

Request No. 2 (b). Defendant admits the matters stated therein.

Request No. 2 (c). Defendant admits the matters stated therein.

Request No. 2 (d). Defendant admits the matters stated therein.

Request No. 2 (e). Defendant admits the matters stated therein.

Request No. 2 (f). Defendant admits the matters stated therein.

Request No. 2 (g). Defendant denies each and

Plaintiff's Exhibit No. 28-A—(Continued)  
every matter and thing stated therein, and in this connection defendant admits that from and after December 31, 1941, defendant has mined, extracted and taken from the mining claims described in the agreement between the parties dated December 31, 1941, ores containing—and principally valuable for—gold, silver, antimony, and tungsten; that no copper was recovered from such ores; that such ores contained sulphur for which no payments were received, and that such ores also contained arsenic for which smelter penalties were charged.

Request No. 2 (h). Defendant denies each and every matter and thing stated therein, and in this connection defendant admits that from December 31, 1941, to July, 1949, defendant shipped—pursuant to the terms of said agreement—concentrates produced from ores mined and extracted from said claims to smelters or reduction plants located at a distance from said mining claims, which smelters or reduction plants were not owned or controlled by defendant and which were not parties to said agreement of December 31, 1941—such smelters or reduction plants being hereinafter referred to as “outside smelters.”

Request No. 2 (i). Defendant denies each and every matter and thing stated therein, and in this connection admits the fact to be that after July 31, 1949, it shipped a substantial portion of concentrates which were principally valuable for their gold content to outside smelters; that during said period defendant shipped to outside smelters—based

Plaintiff's Exhibit No. 28-A—(Continued)

on values—approximately forty-five per cent (45%) of concentrates produced from ore mined or extracted from said mining claims.

Request No. 2 (j). Defendant denies each and every matter and thing stated therein, and in this connection admits that as to all concentrates shipped by it to outside smelters, the defendant computed and paid royalties to plaintiff strictly in accordance with the terms of its agreement with plaintiff, and that "Exhibit 2" attached to plaintiff's complaint is a true copy of a report rendered to plaintiff by defendant for the month of December, 1948.

Request No. 2 (k). Defendant denies each and every matter and thing stated therein, and in this connection admits that payment of royalties made by it to plaintiff on account of concentrates shipped to outside smelters was in the amount of five per cent (5%) of net smelter returns received, and that the payments so made were strictly in accord with the agreement between plaintiff and defendant.

Request No. 2 (l). Defendant denies each and every matter and thing stated therein, and in this connection defendant admits that from and after receipt by defendant of the net smelter returns from concentrates shipped to outside smelters, defendant had no right, title or interest in or to such concentrates, the same being the property of said outside smelters.

Request No. 2 (m). Defendant denies each and every matter and thing stated therein, and in this connection defendant admits that from and after

Plaintiff's Exhibit No. 28-A—(Continued)  
the completion of the Yellow Pine Smelter in the month of July, 1949, defendant processed through said smelter approximately fifty-five per cent (55%)—based on values—of the concentrates produced from ore mined or extracted from said mining claims.

Request No. 2 (n). Defendant admits the matters stated therein.

Request No. 2 (o). Defendant admits the matters stated therein.

Request No. 2 (p). Defendant admits the matters stated therein.

Request No. 2 (q). Answering this Request, defendant alleges the matters and things set forth in Request No. 2 (q) are irrelevant, improper and immaterial to the issues in this case for the reasons that they have no proper relation to and are not material to the question of defendant's alleged liability for the payment of additional royalties under the conveyance and royalty agreement of December 31, 1941; defendant further admits that it has not paid, and has never been under any obligation to pay United Mercury Mines Company and sum or sums equal to five per cent (5%) of the amount paid to defendant by purchasers of products resulting from defendant's Yellow Pine Smelter operations.

Dated this 28th day of September, 1953.

/s/ JOHN D. BRADLEY,

Executive Vice President of Bradley Mining Co.

Plaintiff's Exhibit No. 28-A—(Continued)

Subscribed and sworn to before me this 28th day  
of September, 1953.

[Seal] /s/ AGNES WESTRA,

Notary Public, in and for the City and County of  
San Francisco, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed October 2, 1953.

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DEFENDANT'S EXHIBIT No. 29

July 14, 1945

Boise Purification Plant

Lot B-13-B

Sylvania Electric Products Co.

Gross Sales Value per attached

Invoice .....\$ 34,228.93

Less Operating Costs applicable

including Depreciation ..... 6,295.25

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Subject to Royalty.....\$ 27,933.68

Wet Weights for Hauling Allowance

Boise Lot B-13 consisting of:

Lot 223-3

See B-15

222-3

20,430

222-4

19,792

223-1

25,778

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66,000



Defendant's Exhibit No. 29—(Continued)

Virgin Quicksilver  
Bradley Mining Co.  
425 Crocker Building  
San Francisco 4, California

Invoice No. B-13B. Lot No. B-13B.

Final Invoice

Sold to Sylvania Electric Products, Inc. Towanda, Pennsylvania.

Shipped to same.

Date May 23, 1945.

Customer's order No. T-9275.

Car. No. Pa 571913.

Routing U.P.,C. & N.W., N. Plate, L.V.

Freight prepaid.

Price \$23.50 per short ton unit.

F.O.B. Towanda, Pa.

Terms: Cash.

Date of shipment from Boise, Idaho, 4/26/45.

427 Sacks Scheelite Concentrate.

Sampled and weighed at Boise, Idaho, by Utah Ore Sampling Co.

Assayed by Gulick-Henderson.

Weights: Total Weight 43,163 lbs. Assays:  $\text{WO}_3$  68.03%.

Weights: Tare (Sacks) 256 lbs. Assays:  $\text{H}_2\text{O}$  0.2%.

Weights: Net Wet Weight 42,907 lbs. Assays: P 0.094%.

Weights: Moisture 86 lbs. Assays: As 0.11%.

Weights: Net Dry Weight 42,821 lbs. Assays: Sb 0.17%.

Defendant's Exhibit No. 29—(Continued)

Weights:  $\text{WO}_3$  68.03%. Assays: S 0.36%.

Weights: Content  $\text{WO}_3$  29,131.1 lbs. or 1,456.55 S.T.U.

Weights: 1,456.55 S.T.U. @ \$23.50. Assays: \$34,-  
228.93.

Papers attached herewith:

Utah Ore Sampling Co. Weight & Moisture Certificate  
Gulick-Henderson Co. Assay Certificate.

JPB—GCO

JDB—Boise Office

REB—UMM Co.

HDB

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## DEFENDANT'S EXHIBIT No. 30

[Title of District Court and Cause.]

## PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure, It Is Ordered:

### I.

United Mercury Mines Company, hereinafter called "United", brought this action against Bradley Mining Company, hereinafter called "Bradley", to obtain a decree interpreting a "Conveyance, Royalty Agreement and Option" contract dated December 31, 1941, between United as the first party thereto and Bradley as the second party thereto, a copy of which said contract is attached to plaintiff's complaint as Exhibit "1". United, by its complaint, prays for judgment against Bradley as follows:

## Defendant's Exhibit No. 30—(Continued)

A. That the Court interpret the provisions of said contract and enter its decree herein declaring and decreeing that the proper and legal method for determining the amount of royalty due United from Bradley under the terms of the "Conveyance, Royalty Agreement and Option" for minerals, ores, metals and values extracted or produced from the mining claims described in the agreement and conveyed to Bradley and smelted at the Yellow Pine Smelter owned by Bradley, is by the use of the "net revenue" provision as defined in the agreement;

B. Declaring that it is the duty of Bradley under the terms of said agreement to furnish United the amounts paid by purchasers from the sale of minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine Smelter, and the marketing costs and shipping costs from Cascade, Idaho;

C. That the Court require an accounting by Bradley to United and upon such accounting being had that United have judgment against Bradley for any amount found due, owing and unpaid, and that such amount be declared, as provided in said contract, a mortgage lien in, to and upon the properties therein described;

D. That United have such other and further relief as the Court may deem equitable in the premises, and its costs of suit;

E. The issues are raised by the said complaint and Bradley's answer thereto;

Defendant's Exhibit No. 30—(Continued)

F. Parties: United Mercury Mines Company, plaintiff, and Bradley Mining Company, defendant.

G. The pleadings which raise the issues are

(1) Original Complaint for plaintiff, United Mercury Mines Company, filed July 12, 1951, and

(2) Original Answer of defendant, Bradley Mining Company, filed September 14, 1951.

## II.

Federal jurisdiction is invoked upon the grounds:

A. Diversity of citizenship, in that the plaintiff is a citizen of the State of Idaho and the defendant is a citizen of the state of California, licensed to do business in Idaho.

B. That the amount in controversy exceeds the sum of \$3000.00 exclusive of interest and costs.

## III.

The admitted facts are as follows:

A. The corporate identity of each of the parties, and the qualification of defendant, Bradley Mining Company, as a California corporation to do business in the state of Idaho. The Court has jurisdiction of the subject matter of and the parties to this action. (Answer and Admissions)

B. The execution of the contract (Exhibit 1, plaintiff's complaint as amended by interlineation) of December 31, 1941, by plaintiff and defendant, and the conveyance by plaintiff, United Mercury Mines Company, to defendant of the property agreed to be conveyed under the said contract, and that defendant became and now is owner of the

Defendant's Exhibit No. 30—(Continued)  
Meadow Creek and Henessy Groups of placer and lode mining claims, described in said agreement, subject to the terms and conditions of said agreement, together with all minerals, ores, metals and values contained therein. (Answer and Admissions)

C. That pursuant to said contract defendant mined, extracted and took from the mining properties, minerals, ores, metals and values consisting, among other things, of gold, silver, antimony and tungsten, and prior to commencement of operations of "The Yellow Pine Smelter" the marketable minerals, ores, metals and values were trucked to Cascade, Idaho, and there placed on railroad cars for shipment to smelters or reduction plants located in various parts of the United States and not owned by either plaintiff or defendant, or in which either party had an interest; that monthly statements were rendered by defendant to plaintiff with copies of smelter settlement sheets showing amounts received by defendant and that defendant paid plaintiff five (5%) per cent of the amounts received on the sale of such minerals, ores, metals and values, and that Exhibit 2 attached to plaintiff's Complaint is a true copy of the statement rendered by defendant to plaintiff for the month of December, 1948. (Answer)

That the same practice continued after July 1949 with respect to all shipments to smelters in which neither Bradley nor United had any interest.

D. That in 1949 defendant completed the construction on the mining premises of "The Yellow



## Defendant's Exhibit No. 30—(Continued)

Pine Smelter" solely owned by defendant; that defendant operated said smelter and at the time of the action was operating said smelter; that fifty-five (55%) per cent of the concentrates produced from the ores mined from the property were treated in The Yellow Pine Smelter and after completion of the smelting process certain of the products were sold by defendant to purchasers; that as to concentrates treated in the Yellow Pine Smelter defendant has not computed and paid royalties as demanded by plaintiff, in that as to concentrates treated at the Yellow Pine Smelter on the premises, Bradley has not computed and paid royalties based upon sums received from metal sales. (Answer)

E. That Exhibit 3 attached to plaintiff's complaint is typical of the information furnished by defendant to plaintiff with respect to mined material passing through The Yellow Pine Smelter. (Answer)

That Bradley has paid United royalty upon minerals, ores, metals and values passing into the Yellow Pine Smelter based upon net smelter returns in the manner typified by Exhibit 3, attached to the complaint.

F. That an actual controversy exists between the plaintiff and defendant with respect to their rights and other legal relations under said agreement as follows:

1. The provisions of said agreement applicable to the computation and payment of royalties in re-

Defendant's Exhibit No. 30—(Continued)  
spect to minerals, ores, metals and values smelted at said Yellow Pine smelter.

2. The nature and extent of the obligation of defendant to furnish to plaintiff information that plaintiff may require to assure it that it is receiving the royalty to which it is entitled.

G. That the action is between citizens of different states and the amount in controversy exceeds the sum of \$3000.00, exclusive of interest and costs. (Answer and Admissions)

H. That Bradley completed construction of the Yellow Pine smelter at its own costs and charges upon the mining claims during the year 1949 and went into operation during July, 1949, and it has at all times been its sole property.

I. That the saleable products resulting from concentrates processed at The Yellow Pine Smelter are held and retained by the Bradley Mining Company as its sole property until the same are sold to a purchaser. (Admissions)

J. That Bradley Mining Company has sold to purchasers saleable products resulting from the smelting and reduction of minerals, ores, concentrates, metals and values taken from the said mining claims and smelted in the Yellow Pine Smelter. (Admissions)

K. That from and after receipt by defendant of the net smelter returns from concentrates shipped to outside smelters defendant had no right, title or interest in or to such concentrates, the same being the property of said outside smelters. (Admissions)

## Defendant's Exhibit No. 30—(Continued)

L. That the defendant has sold to purchasers saleable products resulting from the smelting and reduction of minerals, ores, metals and values taken from the said mining claims and smelted in The Yellow Pine Smelter. (Admissions)

M. That defendant has not paid plaintiff sums equal to five (5%) per cent of the amount paid to defendant by purchasers of products resulting from defendant's Yellow Pine Smelter operations. (Admissions)

N. That the books and records of defendant correctly show the amount received by defendant as net smelter returns on all concentrates shipped to independent smelters. (Admissions)

O. That the books and records of defendant correctly show that the royalties payable to the plaintiff on net smelter returns received by defendant, Bradley Mining Company, from independent smelters have been paid to the plaintiff. (Admissions)

P. That at the time of the execution of the contract, December 31, 1941, there were no smelters located at Cascade, Idaho. (Answer and Stipulation)

Q. That, if under the terms of the contract, defendant, Bradley Mining Company is entitled to make any charge or deduction for smelting ores in the Yellow Pine Smelter, the charges and deductions so made by Bradley Mining Company have been proper charges and deductions and all settlements made with the plaintiff have been correct. (Stipulation)

## Defendant's Exhibit No. 30—(Continued)

If it is ultimately determined that the net smelter returns provisions of the agreement is applicable to the operations at the Yellow Pine Smelter for ores, concentrates, metals and values taken from the claims described in the agreement, then the settlements made by Bradley have been correct as to the minerals, ores, metals and values processed at the smelter.

R. That there is no dispute as to the meaning and interpretation of the "net mint return" clause of the contract. (Stipulation)

S. That before 1939 and thereafter at all times material to this action, it was the practice and custom in the smelting industry for companies who own and operate smelters to also own and operate mines; that it was likewise the practice and custom in the industry for companies owning mines and also mining smelters to ship their mine products to their own smelters; that it was likewise the practice and custom with respect to owners of smelters and mines to also lease mining properties from other independent owners and send the products extracted therefrom to their own smelters and to settle for the products so shipped on the same basis as such smelting companies would settle with independent or custom shippers; that it was a practice and custom of the trade that where ores treated came from the mines owned by the owners of smelters, or came from mines leased and mined by the smelter owner, or came from independent custom shippers, that the smelting charges and the cost of



## Defendant's Exhibit No. 30—(Continued)

transportation of concentrates to the smelter were deducted to arrive at a net amount commonly referred to in the mining and smelting industries as "net smelter returns." (Stipulation)

T. That it is a matter of common knowledge and historically recognized in the mining industry that the milling of ores to reduce such ores to a concentrate form is a part of the mining process and that the smelting of ores is not a part of the mining process. (Stipulation)

## IV.

The objections reserved to the facts recited in paragraph III above are as follows:

A. Plaintiff has reserved objection on the ground of materiality or relevancy to the recognized practice and custom in the smelting industry as set forth in III S above.

B. Plaintiff contends that it has reserved objection on the ground of materiality or relevancy with respect to any and all issues raised and to be raised in this action.

## V.

The defendant contends that the following issues of fact remain to be litigated upon the trial of this cause, and that the facts and circumstances surrounding the execution of the contract, as set forth in subdivisions B to H, both inclusive, of this paragraph V serve to aid interpretation of the contract.

A. Whether in the computation of royalties to be paid plaintiff on ores smelted at The Yellow Pine Smelter the "net revenue" clause or the "net



Defendant's Exhibit No. 30—(Continued)  
smelter return" clause of the contract would apply. (Defendant expects to establish the fact that the "net smelter returns" clause was applicable by the pleadings, stipulations, admissions and legal presumptions, and the sources of its proof will be oral testimony and defendant's exhibits.)

B. The circumstances and reasons for the extinguishment of the 1939 contract and the execution of the contract of December 31, 1941. (Defendant will rely upon the pleadings and legal presumptions and the source of its proof will be by oral testimony and defendant's exhibits.)

C. The conduct of the parties, as bearing on interpretation, after execution of the contract of December 31, 1941, and both before and after construction of The Yellow Pine Smelter. (Defendant will rely upon the pleadings and legal presumptions and the source of its proof will be by oral testimony and defendant's exhibits.)

D. The operation by defendant of the Boise Purification Plant as bearing upon accepted interpretation of the contract. (Defendant expects to establish this fact by the pleadings, by admissions and by legal presumptions and the source of its proof will be oral testimony and defendant's exhibits.)

E. The reasons for the inclusion of the "net revenue" clause in the contracts of 1939 and 1941. (The defendant will expect the fact to be established by the pleadings, admissions and legal presumptions and the source of its proof will be oral

## Defendant's Exhibit No. 30—(Continued)

testimony, defendant's identified exhibits, and an exhibit in writing which, after identification, will be offered by the defendant.)

F. The distinction between mining and smelting and that smelting is not considered part of a miner's ordinary treatment processes, and values added by smelting are not values from the mining property. (Defendant expects to establish such facts by stipulations, admissions, judicial notice and legal presumptions, and the manner or source of its proof will be by oral testimony and statute.)

G. That the term "metals produced from the properties" has a distinct application that does not extend to the smelter. (Defendant expects such fact to be established by stipulation, admission, judicial notice and legal presumptions, and the manner and source of its proof will be by oral testimony, defendant's exhibits and statute.)

H. The reason for the inclusion of the word "normal" in the "net smelter returns" clause immediately preceding the words "smelting charges." (Defendant expects this fact to be established by the pleadings, by stipulations, by legal presumptions, and the manner and source of its proof will be by oral testimony, defendant's exhibits and a written exhibit which, when identified, will be offered by defendant.)

The plaintiff contends that the following issues of fact and no others remain to be litigated on the trial of this action:

Defendant's Exhibit No. 30—(Continued)

a. Are royalties on the ores, concentrates, metals and values extracted taken, or produced from the Meadow Creek and Henessy Groups of mining claims and smelted at the Yellow Pine Smelter to be computed and paid in accordance with the "net revenue" provisions contained and defined in the agreement of December 31, 1941?

VI.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto are as follows:

A. Defendant's Exhibits marked for identification as Defendant's Exhibits numbered 1 to 22, inclusive may be offered and admitted in evidence subject to exceptions and objections for relevancy and materiality only.

(1) Agreement dated August 5, 1927, between the United Mercury Mines Company and F. W. Bradley, marked as defendant's Exhibit 1 for identification. (No admission by plaintiff as to genuineness or due execution thereof.)

(2) Agreement dated February 1, 1928, between United Mercury Mines and F. W. Bradley, marked as defendant's Exhibit 2 for identification. (No admission by plaintiff as to the genuineness and the due execution thereof.)

(3) Agreement dated August 30, 1929, between United Mercury Mines Company and Yellow Pine Company, marked as defendant's Exhibit 3 for

## Defendant's Exhibit No. 30—(Continued)

identification. (No admission by plaintiff as to the genuineness and due execution thereof.)

(4) Agreement dated October 3, 1930, between United Mercury Mines Company and Yellow Pine Company marked defendant's Exhibit 4 for identification. (No admission by plaintiff as to the genuineness and due execution thereof.)

(5) Agreement dated May 16, 1939, between United Mercury Mines Company and Bradley Mining Company marked defendant's Exhibit 5 for identification. (No admission by plaintiff as to the genuineness and due execution thereof.)

(6) Agreement dated July 20, 1950, between United Mercury Mines Company and Oscar W. Worthwine, as parties of the first part, and Bradley Mining Company as party of the second part, marked defendant's exhibit 6 for identification. (No admission by plaintiff as to the genuineness and due execution thereof.)

(7) Agreement dated December 31, 1941, between United Mercury Mines Company and Bradley Mining Company marked defendant's Exhibit 7 for identification. (Admissions by both plaintiff and defendant that defendant's Exhibit 7 is a true and correct copy of the original agreement between the parties dated December 31, 1941)

(8) Letter from United Mercury Mines to its stockholders dated December 20, 1941, marked defendant's Exhibit 8 for identification. (Admission by J. J. Oberbillig to have been sent by him as President of the Company.)

Defendant's Exhibit No. 30—(Continued)

(9) Letter from United Mercury Mines to its stockholders dated June 1, 1948, marked as defendant's Exhibit 9 for identification. (Admitted by J. J. Oberbillig to have been sent by him as President of the Company.)

(10) Statement of the returns of shipment of ore to Sylvania Electric Products Company, marked defendant's Exhibit 10 for identification. (No admission with respect to the exhibit.)

(11) Copy of letter dated April 14, 1948, addressed to J. J. Oberbillig, President, United Mercury Mines, signed by John D. Bradley, marked defendant's Exhibit 11 for identification. (No admission that it is true copy of original.)

(12) Copy of a letter from J. J. Oberbillig to John D. Bradley, dated April 22, 1948, marked defendant's Exhibit 12 for identification. (Admitted by J. J. Oberbillig to be a true copy of a letter written by him on that date and mailed to Bradley.)

(13) Schedule.

Summary of Gold Concentrate settlement sheets. Y.P.M. - Y.P.S.

(14) Schedule.

Summary of Antimony Concentrate settlement sheets. U.P.M. - Y.P.S.

(15) Schedule.

Detail of Royalty Paid from beginning of smelter operations to December 31, 1953.

(16) Schedule.

Yellow Pine Smelter illustrative Royalty Calculations. Sheet A.



## Defendant's Exhibit No. 30—(Continued)

(Schedules marked defendant's Exhibits 13, 14, 15 and 16 have been identified and by stipulation agreed that they are correct copies taken from the original records of Bradley Mining Company—objection reserved as to admissibility.)

(17) Letter dated November 17, 1941, from Oscar W. Worthwine to Bradley Mining Company, marked defendant's Exhibit 17 for identification. (Admission as to genuineness—objection reserved as to admissibility.)

(18) Letter dated November 14, 1941, from Oscar W. Worthwine to John D. Bradley, marked defendant's Exhibit 18 for identification. (Admission as to genuineness—objection reserved as to admissibility.)

(19) Letter from J. J. Oberbillig to John D. Bradley, dated November 17, 1941, marked defendant's Exhibit 19 for identification. (Admission as to genuineness—objection reserved as to admissibility)

(20) Telegram from Oscar W. Worthwine to Bradley Mining Company, dated December 11, 1941, marked defendant's Exhibit 20 for identification. (Admission as to genuineness—objection reserved as to admissibility.)

(21) Letter dated December 30, 1941, from Oscar W. Worthwine to Bradley Mining Company, marked defendant's Exhibit 21 for identification. (Admission as to genuineness—objection reserved as to admissibility.)

Defendant's Exhibit No. 30—(Continued)

(22) Letter dated December 30, 1941, from Oscar W. Worthwine to Bradley Mining Company, marked defendant's Exhibit 22 for identification. (Admission as to genuineness — objection reserved as to admissibility.)

(23) Portion of rough draft of 1939 contract between plaintiff and defendant not yet identified, to be offered by the defendant as defendant's Exhibit 23, subject to objections as to relevancy and materiality.

B. Plaintiff's exhibits will consist of the agreement of December 31, 1941, all Interrogatories served and the Answers thereto, now on file herein, all Requests for Admissions and the Answers thereto, now on file herein, and writings to explain, clarify or rebut the contents of defendant's Exhibits above identified, subject to defendant's exceptions and objections for relevancy and materiality only.

## VII.

The defendant contends that following issues of law, and no others, remain to be litigated upon the trial of this cause:

a. The interpretation of the contract of December 31, 1941, particularly to determine whether defendant was properly entitled to compute the royalties payable to plaintiff on ores produced from defendant's property and processed in The Yellow Pine Smelter on the basis of the "net smelter returns" clause, or whether the same should have been computed on the "net revenue" clause.

Defendant's Exhibit No. 30—(Continued)

VIII.

Expert witnesses are limited to three on each side, subject to revision by the Court.

IX.

The case is hereby set for non-jury trial (estimated to require three (3) days) at 10:00 o'clock a.m. on March 19, 1957.

X.

The foregoing admissions of fact having been made by the parties, and the parties having agreed to the foregoing statement of the issues of fact remaining to be litigated and the contention of the parties with respect thereto and with respect to the issues of law, this Order shall supplement the pleading and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated this 11th day of March, 1957.

/s/ WM. C. MATHES,  
United States District Judge.

Approved as to form and content:

/s/ PAUL S. BOYD,  
/s/ DALE CLEMONS,  
Attorneys for Plaintiff,  
Residence: Boise, Idaho.

/s/ RALPH R. BRESHEARS,  
Of Counsel for Defendant,  
Residence: Boise, Idaho.

[Endorsed]: Filed March 19, 1957.

PLAINTIFF'S EXHIBIT No. 31

[Letterhead of Bradley Mining Co.]

December 2, 1948

Mr. John J. Oberbillig, President,  
United Mercury Mines Co.,  
256 Sonna Building, Boise, Idaho.

Dear John:

Subject: United Mercury Mines Royalty Situation After Smelter Commences Operation

Referring to our conversations in Boise last week in company with Messrs. Driscoll, Worthwine, and Davis, I wish to advise you that I have given continued thought to the matter of the proper method of determining the point at which the 5% royalty should apply after our smelter commences operations in July or August of next year. In reviewing this situation I continually return to the premise that the gross yield from the sale of products coming out of the smelter is allocable to three principal categories:

(a) the gross income which is derived from mining;

(b) the gross income which is derived from ore dressing and concentration;

(c) the gross income which is derived from roasting and smelting operations.

Each of these activities is entitled to a reimbursement of its cost, including depreciation on the equipment and an annual remuneration on the investment contributing to the profits.

## Plaintiff's Exhibit No. 31—(Continued)

The Bureau of Internal Revenue allocates gross income into only two categories:—gross income from mining, and gross income from roasting and smelting. The Income Tax Law and Regulations classify all ore dressing and concentration as “mining operations”.

It has been my suggestion that we agree to base the royalty upon the fair market value of the concentrates at the mouth of the roaster for a period of three years beyond January 1, 1950, and to include that portion of 1949 during which the smelter will operate. Truck and/or rail freight to a competing smelter will not be deducted in determining the market value of the concentrates at the mouth of the roaster.

On October 1, 1953, i.e., three months prior to the termination of such an agreement, we should review the situation and then negotiate a new formula for valuation of the concentrates in the light of the facts then existing. At that time we would ask for bids on concentrates being currently produced, and strive for an agreement which would be followed for the ensuing three-year period from January 1, 1954 to December 31, 1956. We could agree now with respect to the valuation of concentrates for that period on a formula which might be applied in case we could not secure bona fide bids for our concentrates at that time.

I suggest the following formula to be used in lieu thereof if these circumstances exist:

Reduce the proceeds from the sale of the prod-



## Plaintiff's Exhibit No. 31—(Continued)

ucts coming from the smelter by the operating costs necessary and incidental to the production of the products in the smelter and roaster.

Reduce this balance by a reasonable depreciation on the smelter and roaster and the other tangible property necessary and incidental to the smelting operations.

Then reduce the balance by a remuneration on the investment in the smelter and the roaster at a percentage which will approximate the yield made on investments by comparable smelters.

This formula, of course, would not be used by us if we could procure bona fide bids for the concentrates from custom smelters f.o.b. smelters contacted.

I propose as an amendment the following:

It is understood and agreed that the basis for United Mercury Mines royalty payments from the commencement of the smelter until December 31, 1953, will be the highest amount that would be received if concentrates were shipped under present prevailing contracts. These concentrates, we now anticipate, will analyze as follows:

## Gold concentrate:

2.3	ozs.	gold
3.6	ozs.	silver
4-7	%	antimony
7	%	arsenic
35	%	iron
37	%	sulphur
10	%	SiO <sub>2</sub>

## Plaintiff's Exhibit No. 31—(Continued)

## Antimony concentrate:

0.75 ozs. gold

16. ozs. silver

42 % antimony

13 % iron

3.4 % arsenic

20 % sulphur

12 %  $\text{SiO}_2$ 

For antimony concentrate the highest value calculated from the following two contracts will prevail:

1. Harshaw Chemical Co.
2. Bunker Hill & Sullivan.

For the gold concentrate the highest value calculated from the following contracts will prevail:

1. A. S. & R. Co. (a) Selby Smelter. (b) Garfield Smelter.
2. U. S. Smelting Refining & Mining Co.—Midvale plant.

Provided you agree to this procedure, we will submit copies of the above-mentioned contracts for your study.

Under the proposed new arrangement (effective from the commencement of smelter operations to December 31, 1953) we would determine the tonnage and contents of concentrates produced in the Yellow Pine Mine concentrator from ores extracted from the Yellow Pine Mine. We would combine these figures into a statement for you on which they would be tabulated, totaled, and the to-be-agreed-upon smelter formula applied to determine the

Plaintiff's Exhibit No. 31—(Continued)

value of the concentrator output subject to royalty. The statement and check for the royalty would be submitted to you by the 20th of the second succeeding month following the month of production. This timing would approximate our present arrangement, as about one month is now required for shipment and settlement.

As you will note, copies of this letter are being mailed to Lynn Driscoll and Oscar Worthwine—I trust you will get together there for a discussion re. this matter at an early date, so that by the time of my Boise return (approximately December 13) we can have a general conference.

With kindest regards, I am

Sincerely yours,

/s/ John D. Bradley,

Executive Vice President.

JDB:MM—cc. Lynn Driscoll, O. W. Worthwine.

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DEFENDANT'S EXHIBIT No. 32

[Letterhead of Bradley Mining Co.]

March 31, 1948

Mr. John J. Oberbillig, President,  
United Mercury Mines Co.,  
256 Sonna Building, Boise, Idaho.

Dear John:

As Harold Bailey and I explained to you on March 12, 1948 in your office, we are planning on

## Defendant's Exhibit No. 32—(Continued)

erecting at Stibnite a smelter for the local reduction of our antimony concentrates — our present plans also include locally reducing our gold concentrates in the future.

Although I am positive that you fully appreciate the importance of such a move, still I am listing below the benefits of a smelter to the Yellow Pine Mining District as we see them at present.

## 1. Longer life for Yellow Pine Mine.

Upgrading of marginal ore bodies owing to greater metal recoveries and payments will add longer life to the Yellow Pine Mine. At the present time we have approximately  $11\frac{1}{2}$  million tons of low-grade antimony-gold ore which can only be made profitable with a local smelter—undoubtedly, large additional tonnages of this type of material will be developed as we continue our drilling and other exploration programs.

## 2. Larger metal payments.

Under the present program of shipping raw concentrates, there is no pay for gold and silver in the antimony concentrates; and in the instance of the gold concentrates, there is little and sometimes no pay for the antimony contained in these concentrates — this situation will be corrected by the smelter installation.

## 3. Greater metal recoveries.

In having to make special grades of concentrates for the marketing of raw antimony concentrates, there is a larger concentrating loss than will be the case when only one grade antimony concentrate

Defendant's Exhibit No. 32—(Continued)  
need be produced for the local smelter.

4. Prospects in area will have much better chance of becoming productive.

5. Prospecting in area will be stimulated.

6. Many benefits to National Defense program.

(a) Greater antimony metal recovery at less material and manpower cost.

(b) Making commercial large tonnage of low-grade antimony ore.

(c) Stimulus to antimony prospecting and mine development in entire Northwest.

(d) Elimination of heavy trucking operations which consume large quantities of critical materials.

(e) Making available railroad cars which are now tied up hauling antimony concentrates to various parts of the United States.

It appears to us that with your foresight and great faith in the Yellow Pine Mining District you are as anxious as we to see the smelter completed at as early a date as possible. In fact, you raised the question at our March 12, 1948 meeting why we had not taken earlier action on this important matter. My reply to this, as you will recall, was that we not only had to eliminate other likely possibilities for local reduction before deciding on the present pyrometallurgical plant, but that we also had to study and analyze the demand situation along with the ability of other countries to produce in competition with us. We have not been able to eliminate completely all the questions that occur to us re. the latter, but after going into the matter with the Na-



Defendant's Exhibit No. 32—(Continued)

tional Lead Company (which is this country's largest antimony consumer), we have developed sufficient faith to take the deep step. Another main reason for our hesitancy, of course, has been the rather limited tonnage of antimony ore developed in the past. Our reserves of gold ore are far in excess of our antimony ore reserves, but we believe we now have enough antimony ore to pay for the smelter, and also have faith that we will discover more ore in the near future. As you know, we are now carrying on two major development campaigns in the Meadow Creek and Clark Tunnel areas.

In view of the foregoing described smelter program, there is need for giving early consideration to altering our agreement.

According to the present Bradley Mining Co.-United Mercury Mines Co. contract, "normal smelting charges" are to be deducted in arriving at "net smelter returns". "Normal smelter charges", as you know, are comprised not only of treatment charges but also metal and quotational gains. In fact, in the case of our antimony shipments the "normal smelting charges" are entirely quotational gains.

I believe you will agree with us that to arrive at "normal smelting charges" for our several different types of concentrates in the case of a local smelter can prove most complex over the ensuing years. Accordingly, I am proposing a simplified procedure for locally reduced concentrates—such procedure to be equivalent to the royalty you now receive on the

Defendant's Exhibit No. 32—(Continued)  
 present 5% basis when it is applied to the shipment  
 of raw concentrates.

Although the following calculations show a variance for the equivalent royalty in the instance of sales of locally reduced products from 2.30% to 2.58%, we have proposed that the rate for such products be set at 2.75%.

Sb Concentrate:

1. Actual 1947 net smelter returns for all Sb concentrate including Bunker Hill Smelter .....	\$1,666,882
Less Hauling Allowance .....	33,583
	<hr/>
Subject to Royalty .....	\$1,633,299
	<hr/>
Royalty @ 5% .....	\$ 81,665
	<hr/>
2. 1947 net smelter returns, had all Sb concentrate except that to Bunker Hill Smelter gone to Harshaw Chemical Co. at December price and freight, would have been .....	\$1,407,670
Bunker Hill Smelter .....	302,835
	<hr/>
	\$1,710,505
Less Hauling Allowance .....	33,583
	<hr/>
Subject to Royalty .....	\$1,676,922
	<hr/>
Royalty @ 5% .....	\$ 83,846
	<hr/>
3. 1947 net smelter returns, had all Sb con- centrate except that to Bunker Hill Smelter gone to Harshaw Chemical Co. at April 1948 price and freight, would have been .....	\$1,509,771
Bunker Hill Smelter .....	302,835
	<hr/>
	\$1,812,606

## Defendant's Exhibit No. 32—(Continued)

Less Hauling Allowance .....	33,583
Subject to Royalty .....	\$1,779,023
Royalty @ 5% .....	\$ 88,951

Assuming that a local smelter would recover 100% of the metals contained in this concentrate and that they could be sold at prevailing prices, the dollar recovery would be:

Au 9,355 oz. @ \$34	\$ 318,070
Ag 201,967 oz. @ 90c-5%	172,682
Sb 9,588,750 lbs. @ 32c	3,068,400
	<u>\$3,559,152</u>

Equivalent Royalty to No. 1 above .....	2.30%
Equivalent Royalty to No. 2 above .....	2.36%
Equivalent Royalty to No. 3 above .....	2.50%

## Au (Regular) Concentrate:

Net smelter returns (actual) (United States Smelting Refining & Mining Co.) .....	\$ 481,008
Less additional freight now in effect @ 20%	9,375
	<u>\$ 471,633</u>
Less Hauling Allowance (7,257 W.T.) .....	18,143
Subject to Royalty .....	\$ 453,490
Royalty @ 5% .....	<u>\$ 22,675</u>

Note: The above \$481,008 net smelter returns actually includes Sb price adjustment of approximately \$3,800 a/c 1946 shipments. If this were removed the equivalent royalty given below would be 2.56%.

Assuming local smelter, 100% recoveries, etc. (as above), the dollar recovery would be:

Au 14,323 oz. @ \$34	\$ 486,982
Ag 39,900 oz. @ 90c-5%	34,115

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Defendant's Exhibit No. 32—(Continued)

Sb 1,118,968 lbs. @ 32c	358,070
	<hr/>
	\$ 879,167
	<hr/>
Equivalent Royalty .....	2.58%
	<hr/>
Au (No. 2) Concentrate:	
Net smelter returns (actual) (American Smelting & Refining Co.) .....	\$ 179,327
Less additional freight now in effect @ 20% ....	4,088
	<hr/>
	\$ 175,239
Less Hauling Allowance (3,137 W.T.) .....	7,843
	<hr/>
Subject to Royalty .....	\$ 167,396
	<hr/>
Royalty @ 5% .....	\$ 8,370
	<hr/>
Assuming local smelter, 100% recoveries, etc. (as above), the dollar recovery would be:	
Au 6,933 oz. @ \$34	\$ 235,722
Ag 11,826 oz. @ 90c-5%	10,111
Sb 322,328 lbs. @ 32c	103,145
	<hr/>
	\$ 348,978
	<hr/>
Equivalent Royalty .....	2.40%
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Please give the foregoing your early and serious consideration so that we can discuss it in Boise later this month.

With kindest regards, I am

Sincerely yours,

/s/ John

John D. Bradley,

Executive Vice President.

JDB:MM—cc: OWW

[Endorsed]: No. 15652. United States Court of Appeals for the Ninth Circuit. United Mercury Mines Company, a corporation, Appellant, vs. Bradley Mining Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed July 31, 1957.

Docketed: August 5, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals for the Ninth Circuit

No. 15652

UNITED MERCURY MINES COMPANY, a corporation, Appellant,

vs.

BRADLEY MINING COMPANY, a corporation, Appellee.

### STATEMENT OF POINTS

The appellant submits the following statement of points on which it will rely in this appeal as follows:



I.

The court erred in making the following findings of fact:

- (a) Paragraph XIX.
- (b) Paragraph XXI.
- (c) Paragraph XXII.
- (d) Paragraph XXIII.
- (e) Paragraph XXIV.
- (f) Paragraph XXV.
- (g) Paragraph XXVI.

(h) That portion of Paragraph XXVII, as follows: "and that in itself would be a construction contrary to the purpose of the contract and contrary to plaintiff's avowed purpose at the time the contract was executed."

(i) That portion of Paragraph XXVIII, as follows: "and in that contemplation the parties inserted in the contract the following provision: 'Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.'"

- (j) Paragraph XXIX.
- (k) Paragraph XXXI.
- (l) Paragraph XXXIII.
- (m) Paragraph XXXIV.
- (n) Paragraph XXXV.
- (o) Paragraph XXXVI.
- (p) Paragraph XXXVII.
- (q) Paragraph XXXVIII.

(r) Paragraph XXXIX.

(s) Paragraph XL.

(t) Paragraph XLI.

## II.

The Court erred in concluding:

(a) Under paragraph II of its conclusions of law that the proper and legal method for determining the amount of royalty due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941 for minerals, ores, metals and values extracted from the mining claims described therein and smelted at the Yellow Pine smelter of the defendant is by the use of "net smelter returns" provision as defined in the contract and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of saleable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by the defendant at the Yellow Pine Smelter.

(b) Under paragraph III of its conclusions of law that the defendant does not owe plaintiff anything by way of royalties, or otherwise, for or on account of any ores, concentrates, metals or values taken from the mining claims described in said contract and processed at the Yellow Pine smelter.

## III.

The Court erred in adjudging:

(a) In Paragraph I. of its Judgment, that the

proper and legal method for determining the amount of royalties due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941 for minerals, ores, metals or values extracted from the mining claims described therein and smelted at the Yellow Pine smelter of the defendant is by the use of "net smelter returns" provision as defined in the contract and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of saleable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by defendant at the Yellow Pine smelter.

(b) In Paragraph II. of its Judgment, that the defendant is not indebted to the plaintiff, and that the plaintiff is not entitled to recover from the defendant any monies by way of royalty, or otherwise, for and on account of any ores, concentrates, metals or values taken from the mining claims described in said "Conveyance, Royalty Agreement and Option" and processed at Yellow Pine smelter.

Dated this 13th day of August, 1957.

PAUL S. BOYD,  
E. H. CASTERLIN,  
DALE CLEMONS,

/s/ By DALE CLEMONS,

Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 13, 1957. Paul P. O'Brien, Clerk.